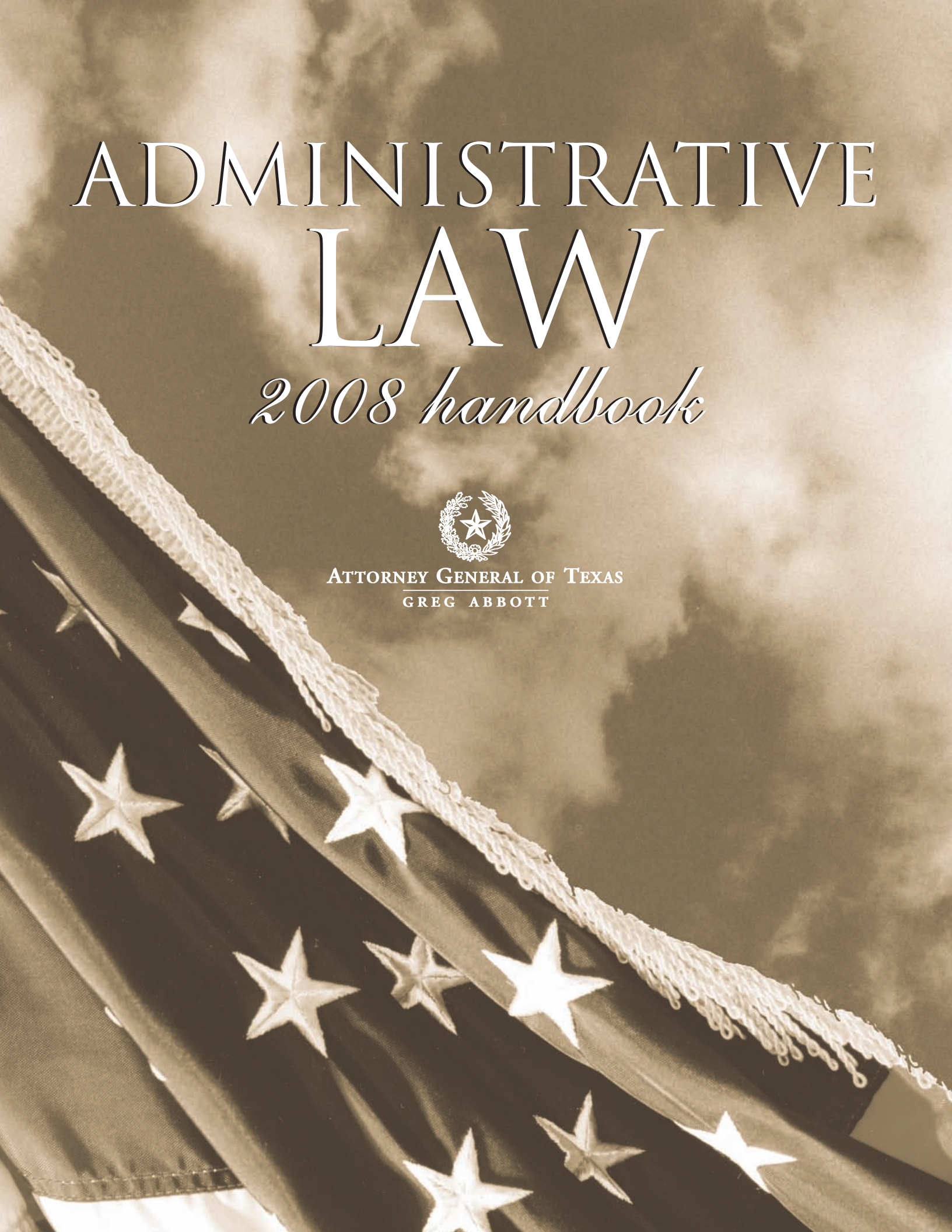

ADMINISTRATIVE LAW

2008 handbook

ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 1, 2008

To State Agency and Local Government Officials, Administrators, Counsels and Staff:

Texans expect and deserve the highest quality services that state government can provide. Toward this goal, I am pleased to present the 2008 *Administrative Law Handbook*, published by the Office of the Attorney General.

This handbook covers three state statutes: the Administrative Procedure Act, the Texas Public Information Act and the Texas Open Meetings Act. The Administrative Procedure Act applies primarily to state regulatory agencies, which have a significant impact on the lives of Texas residents. The Public Information and Open Meetings Acts apply to all state and local government agencies.

I offer this handbook as a means of helping you and your staff to become familiar with and understand the basic tenets of these Acts. Although not a substitute for legal advice, this handbook can assist in pointing out statutory requirements and directing users to a course of action. Detailed guides to the Public Information and Open Meetings Acts are also published by my office and are available both on the Internet and in print.

As your Attorney General and legal counsel for the State of Texas, I am committed to giving state agencies the best possible legal advice and support. The Office of the Attorney General is ready to provide you and your agency with legal counsel and any other legal services you may require. Please do not hesitate to contact my office whenever you need assistance.

Sincerely,

Greg Abbott
Attorney General of Texas

2008 Administrative Law Handbook

Overview:

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Overview:

The Administrative Law Handbook

This handbook primarily discusses the Administrative Procedure Act. It covers adjudication, rulemaking, judicial review of each type of action, and enforcement of agency orders and rules. It also discusses the Attorney General's role as the State's legal representative. The last section, captioned "Open Government," contains brief discussions of the Public Information and Open Meetings laws.

This handbook is merely a guide; it cannot take the place of legal counsel. When in doubt about an aspect of a specific case, Attorney General ruling, or statutory requirement, an agency should consult its attorney.

The Office of the Attorney General also publishes an Open Records Handbook and an Open Meetings Handbook. For copies of those publications or for a complete listing of publications available from this agency, write to:

Office of the Attorney General
Public Information & Assistance Division
PO Box 12548 - MC027
Austin, TX 78711-2548

These handbooks and other OAG publications are also available online at the OAG Web site:

www.oag.state.tx.us/newspubs/publications.shtml

OAG publications are free and you are welcome to download them and make copies as needed.

Laws Governing Actions of State Boards, Commissions, and Agencies

State agencies are governed by many different provisions of law. Each state agency is initially created and defined by its enabling statute. In addition, three other primary Texas laws govern the actions and procedures of state agencies:

- The Administrative Procedure Act provides general legal requirements that agencies must adhere to when adopting rules or conducting contested cases.[1]

- The Texas Open Meetings Act requires that all governmental bodies deliberate in public meetings, unless a closed or executive session is expressly authorized.[2]

- The Public Information Act specifies that documents or records of a state agency are open, unless an express exception to disclosure applies to a particular record.[3]

State agencies also must observe the provisions of the United States Constitution, the Texas Constitution, the General Provisions of the state General Appropriations Act, and all other state and federal laws. Various statutes set out procedures for specific actions, such as competitive bidding for government purchases. For the most part, however, the three statutes listed above determine the procedural requirements applicable to the actions of state boards, commissions and agencies.

Enabling Statutes

Enabling statutes set forth an agency's powers and duties. Ordinarily, enabling statutes contain both procedural requirements and substantive law. For example, an enabling statute may provide that an agency shall meet regularly or a specified number of times each year (procedural); the statute will also set out the specific responsibilities of the agency (substantive). Enabling statutes also establish specific substantive requirements governing the agency's actions in granting, denying, renewing or revoking licenses or certificates.

Most agencies have their own unique enabling statutes. An agency's governing body and staff must be familiar with the enabling statute, because an agency may not enact rules or take other action that exceeds the authority granted in that statute.

A discussion of all the statutes that create and govern the numerous boards, commissions and agencies of Texas is beyond the scope of this handbook. Each agency should carefully review its own enabling statute, along with the Administrative Procedure Act, before taking any action such as holding a contested hearing or adopting rules.

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1 TEX. GOV'T CODE ANN. §§ 2001.001 *et seq.*

2 TEX. GOV'T CODE ANN. §§ 551.001 *et seq.*

3 TEX. GOV'T CODE ANN. §§ 552.001 *et seq.*

The Administrative Procedure Act

The Administrative Procedure Act (APA) governs two basic types of agency action: adjudication and rulemaking. Adjudication occurs when the "legal rights, duties, or privileges of a party are to be determined by a state agency after an opportunity for adjudicative hearing."[4] An agency's enabling statute ordinarily states when an adjudicative or contested case hearing is required. The APA sets out the procedures an agency and parties to a matter must follow in conducting a contested case.

Formal rulemaking pursuant to the APA is required for any "agency statement of general applicability that implements, interprets, or prescribes law or policy, or describes the procedure or practice requirements of a state agency."[5] An agency may, in some instances, announce and apply new interpretations of law for the first time in an adjudicative hearing. As a general rule, however, an agency proceeds by rulemaking to announce significant new interpretations of its law or rules.

The Texas Open Meetings Act

The Open Meetings Act requires that all governmental bodies, as defined in the Act, must deliberate or take action on public business and policy in a properly posted open meeting unless a closed or executive session is expressly authorized. Seven days' notice, exclusive of the posting date and the meeting date, must precede all meetings of a governmental body having statewide jurisdiction. The Act provides that notice of state agency meetings be provided to the Secretary of State, who posts the notice on its website immediately and publishes notice of all public meetings in the *Texas Register* once a week (Fridays). The Texas Register is available at www.sos.state.tx.us/texreg.

The notice must be specific; *i.e.*, it must reasonably apprise the public of the specific issues to be discussed, even when a closed session on the issue is anticipated. The greater the expected public interest in a topic, the more specific a posting should be. No topic may be discussed or voted on unless it is set forth in the meeting's notice.

The Texas Public Information Act

The Public Information Act mandates public access to information in the possession of governmental bodies. Information subject to the Act includes not only paper documents but also tape recordings, computer files, photographs and many other forms of information. Exceptions to disclosure protect a wide range of interests, including individual privacy and considerations of public safety. If a governmental body receives a request for information, it must either provide the information or seek an Attorney General's decision regarding the applicability of an exception to disclosure.

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4 TEX. GOV'T CODE ANN. § 2001.003(1).

5 TEX. GOV'T CODE ANN. § 2001.003(6)(A).

Adjudication:

Procedural Requirements Governing Contested Cases

Adjudication generally occurs when an agency refuses to license a person or entity, revokes an existing license or permit, assesses an administrative penalty, or otherwise takes agency action affecting a person or an entity's legal interests. A license includes any "state agency permit, certificate, approval, registration or similar form of permission required by law."[6] The APA refers to adjudicative proceedings as "contested cases." According to the APA, a contested case is a proceeding "in which the legal rights, duties, or privileges of a party are to be determined by an agency after an opportunity for adjudicative hearing."[7]

The APA is a procedural act and does not grant substantive rights.[8] Compliance with the contested case provisions of the APA is required only if "some other law, statute, or rule requires that agency licensing action be preceded by notice and opportunity for hearing."[9] Therefore, not all agency decisions necessitate compliance with the procedural protections afforded by the APA.

The procedures governing contested cases, from the initiation of a case through judicial review, are outlined below in chronological order. Also provided are sample forms that may be used in connection with an APA proceeding; these forms are offered as general guides and will vary from one agency to the next. The focus of this handbook is on professional occupational licensing agencies and contested cases involving such licenses.

Initiating a Contested Case

Many different circumstances arise that cause an agency to contemplate denying a license, revoking an existing license or disciplining a current licensee. An agency may decide to deny a license in response to the information provided in the license application. An agency may receive a complaint from a member of the public about a licensee. **[See Figures 1 and 2: Complaint Form; Acknowledgment of Complaint Letter.]** Other times, the agency's own staff may uncover information through investigation or through informal or authorized random compliance visits made to licensees or licensed facilities.

Typically, the agency informs the licensee of an investigation or complaint at the time when adverse action is first contemplated. This may be accomplished by means of a letter. **[See Figure 3: Notification of Complaint.]** Agencies ordinarily also provide licensees with copies of any complaints against them. Except when an agency's enabling statute specifies otherwise, the law does not require that the licensee receive a separate notification of investigation prior to the notice of

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6 TEX. GOV'T CODE ANN. § 2001.003(2).

7 TEX. GOV'T CODE ANN. § 2001.003(1).

8 *Employees Retirement Sys. of Texas v. Foy*, 896 S.W.2d 314, 316 (Tex.App.—Austin 1995, writ denied); *Motorola, Inc v. Bullock*, 586 S.W.2d 706, 708-709 (Tex.Civ.App.—Austin 1979, no writ).

9 *H. Tebbs, Inc. v. Silver Eagle Distrib., Inc.*, 797 S.W.2d 80, 85 (Tex.App.—Austin 1990, no writ).

hearing. The agency may also request information from third parties in conducting the investigation. **[See Figure 4: Request to Third Party for Information.]**

Stale Charges

There is no statute of limitations for pre-prosecution delays in agency disciplinary actions, but agencies may have rules that prohibit prosecutions after a certain time period.[10] In a case where the agency waited over thirteen years to prosecute a doctor for molesting two female patients, the court found a due process violation in one case, but not the other. In finding no due process violation, the court noted that the doctor had "contemporaneous notice" of one patient's complaint - she confronted him; she wrote him a letter, resulting in a phone conversation regarding the incident. The patient also filed a written complaint with the county medical society. The court held that no due process violation had occurred because the doctor had "contemporaneous notice" of the complaint and "documentary evidence" existed which makes a disciplinary action less likely to be prejudiced by the passage of time.[11]

The Licensee's Opportunity to Respond

The APA provides that any revocation or suspension of a license governed by that Act must be preceded by notice and an opportunity to show compliance with the applicable law.

> **A revocation, suspension, annulment, or withdrawal of any license is not effective unless, *before institution of state agency proceedings*: (1) the agency gives notice by personal service or by registered or certified mail to the license holder of facts or conduct alleged to warrant the intended action; and (2) the license holder is given an opportunity to show compliance with all requirements of law for the retention of the license.**[12]

The minimum legal requirements for notice and opportunity to show compliance are met by the agency's formal notice of hearing to the licensee.[13] As discussed later in this handbook under the heading Notice of Hearing, the formal notice of hearing requirement must always be met regardless of any other procedures an agency may choose to follow.

While not required to do so by law, an agency may offer an additional opportunity to show compliance when it notifies the licensee of the complaint. **[See Figure 3: Notification of Complaint.]** Additionally, agencies hold informal conferences to provide licensees the opportunity to respond to complaints in person in addition to the opportunity previously provided in writing. Agencies are not required to offer or hold informal conferences in every case. However, agencies may be required by statute to adopt procedures governing informal conference and disposition. **[See Figure 5: Informal Conference Procedures.]** The APA expressly allows a contested matter to be resolved informally. **[See Figure 6: Offer of Informal Conference.]** Agencies frequently include

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[10] *See, e.g.,* Appraiser Board rule, 22 Tex. Admin. Code § 153.20(e) (two-year limitation on prosecution).

[11] *Granek v. Texas Bd. Of Medical Examiners*, 172 S.W.3d 761, 775 (Tex. App. - Austin 2005, no pet.)

[12] TEX. GOV'T CODE ANN. § 2001.054(c) (emphasis added).

[13] *Guerrero-Ramirez v. Texas State Bd. of Medical Examiners*, 867 S.W.2d 911, 917-18 (Tex.App.—Austin 1993, no writ).

with the letter offering an informal conference an exhibit that details the allegations made against the licensee contained in the complaint previously sent to the licensee and any other allegations as developed through the agency's investigation up to that date. The exhibit should reflect how the allegations, if true, violate the applicable agency statute and rules. **[See Figure 7: Allegations.]**

The agency may be persuaded at the informal conference that no violation of the law has occurred. **[See Figure 8: Notification of No Action Decision.]** The failure of a licensee to respond in writing or to appear at an informal conference does not prevent the agency from proceeding with a formal hearing. Any information gained by the agency at the informal conference may be used at a subsequent formal hearing, unless the agency has stated otherwise to the licensee or in its rules governing informal conferences.

Agreed Orders

Under the APA, an agency and a party may dispose of a contested case by agreement.[14] For example, a licensee might agree to a suspension or administrative fine, if offered, rather than face a potentially harsher penalty if the matter proceeds to a contested case hearing. Any such agreement must be in writing and signed by all parties, including the full board. **[See Figure 9: Proposed Agreed Order Cover Letter; Figure 10: Agreed Final Order.]** Occasionally, a licensee may voluntarily surrender the license. Also, an agency may sometimes determine that the licensee's conduct has been so egregious that nothing short of revocation is acceptable. In such a circumstance, the agency may choose to request that the licensee voluntarily surrender the license. **[See Figure 11: Proposed Voluntary Surrender of License Cover Letter; Figure 12: Affidavit - Voluntary Surrender of License; Figure 13: Final Order - Revocation on Voluntary Surrender of License.]**

Notice of Hearing

If the agency chooses to proceed with a formal hearing, notice of the hearing is mandatory and must comply with the requirements of the APA.[15] **[See Figures 14 and 15: Notice of Hearing and Complaint.]** The notification for a hearing in a contested case must include:

> **(1) a statement of the time, place and nature of the hearing;**
>
> **(2) a statement of the legal authority and jurisdiction under which the hearing is to be held;**
>
> **(3) a reference to the particular sections of the statutes and rules involved; and**
>
> **(4) a short, plain statement of the matters asserted.**[16]

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[14] TEX. GOV'T CODE ANN. § 2001.056.

[15] The agency should also review its enabling statute, because the agency's requirements for notice of hearing may be more extensive than those of the APA.

[16] TEX. GOV'T CODE ANN. § 2001.052.

The State Office of Administrative Hearings also requires that the notice contain a citation to its rules.[17]

The agency must inform the licensee of the specific facts or conduct that caused the agency to consider taking action against the licensee.[18] The law does not require that an agency provide details of all the legal theories upon which it may base its action; however, the agency must specify which provisions of law or agency rules it believes the licensee may have violated.[19] More than a quotation from a particular state agency's enabling statute may be required by way of notice to give a licensee both reasonable notice and the due process of law guaranteed by the state and federal constitutions.[20] The agency should state the issues of fact and law that will control the result to be reached by the agency.

The APA allows for a party to request that the agency provide a more definite and detailed notice of hearing.[21] If the party fails to make a timely request for a more definitive statement, the right to complain of defects in the agency's notice is waived.[22] An agency should not, however, rely on the possibility that a party may waive the right to complain about the sufficiency of the substance of the notice. An agency should fully describe the actions and/or omissions that the individual is alleged to have committed. The person at the agency who prepares the notice should place himself or herself in the position of the licensee/applicant receiving the notice and answer the question, "Does the notice sufficiently advise me of the reason for and subject matter of the hearing?"

The APA requires the licensing agency to provide ten days' minimum notice in contested cases unless otherwise specified by the agency's enabling statute.[23] The date of the hearing should not be included in calculating the date by which notice must be given.[24]

In some circumstances, the statutorily prescribed 10-day notice period actually may not be reasonable. An applicant or licensee may be entitled, as a matter of statutory right and constitutional due process of law, to show that additional time should be allowed in the interest of fairness.[25] The administrative law judge will usually grant a timely motion for continuance when a party shows due diligence in, for example, hiring an attorney or attempting to secure witnesses. The decision to grant a continuance is within the hearings officer's discretion.[26]

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17 TEX. ADMIN. CODE § 155.27(a).

18 TEX. GOV'T CODE ANN. § 2001.051.

19 *Texas State Bd. of Pharmacy v. Seely*, 764 S.W.2d 806, 813-15 (Tex.App.—Austin 1988, writ denied).

20 *Madden v. Texas State Bd. of Chiropractic Examiners*, 663 S.W.2d 622, 626-27 (Tex.App.—Austin 1983, writ ref'd n.r.e.).

21 TEX. GOV'T CODE ANN. § 2001.052(b).

22 *Texas State Bd. Dental Examiners v. Silagi*, 766 S.W.2d 280, 284 (Tex.App.—El Paso 1989, writ denied).

23 TEX. GOV'T CODE ANN. § 2001.051; *Gibraltar Savings Ass'n v. Franklin Savings Ass'n*, 617 S.W.2d 322, 325 (Tex.App.—Austin 1981, writ ref'd n.r.e.). The 10 days referenced is generally counted as 10 calendar days.

24 *Silagi*, 766 S.W.2d at 284.

25 *Gibraltar Savings Ass'n v. Franklin Savings Ass'n*, 617 S.W.2d 322, 328 (Tex.App.—Austin 1981, writ ref'd n.r.e.).

26 *State v. Crank*, 666 S.W.2d 91 (Tex. 1984).

The State Office of Administrative Hearings

The State Office of Administrative Hearings (SOAH) was created in 1991 by the 72nd Texas Legislature as an independent agency to manage and conduct hearings in contested cases for most licensing and other state agencies.[27] Most of the hearings it conducts are governed by the APA, SOAH rules of procedure,[28] and applicable statutes, rules and written policies of the referring agency.[29]

The SOAH was originally created to serve agencies that did not employ persons whose only duty was to preside as hearings officers over matters related to contested cases before state agencies. Certain other agencies not required by statute to use the SOAH have contracted with it to have their hearings conducted by its Administrative Law Judges (ALJs). The SOAH has also been given additional jurisdiction to conduct hearings for other agencies since its creation.[30]

The SOAH currently conducts hearings for approximately 60 state agencies, including the Public Utility Commission, Texas Commission on Environmental Quality, Texas Department of Insurance, Employees Retirement System, Texas Alcoholic Beverage Commission, Texas Medical Board, Texas Department of Agriculture, Workers' Compensation Division of the Texas Department of Insurance, Texas Board of Chiropractic Examiners, Texas Board of Dental Examiners, and other licensing and regulatory agencies.

The mission of the SOAH is to assure that hearings in contested cases are conducted fairly, objectively, promptly and efficiently and that they result in quality and timely decisions. The APA's prohibition on *ex parte* communications applies to ALJs; therefore, parties should not expect ALJs to field telephone calls regarding their cases. Procedural questions are usually referred to the Docketing Division or support staff for assistance.

While most SOAH hearings are conducted in Travis County, some cases are heard in other counties when required by law.

An agency initiates a proceeding at the SOAH by requesting a setting of hearing or requesting assignment of an ALJ to a case. **[See Figure 16: Request to Docket Case.]** If the agency requests a setting of hearing, the agency usually seeks a specific date or range of dates for the hearing. The SOAH's Docketing Division sets the case as close to that time as the calendar permits, and confirms the hearing date with the referring agency. Generally, the referring agency is required to issue the Notice of Hearing to the parties.

An ALJ is assigned to the case approximately one week before the hearing date unless procedural disputes arise or some other reason requires an earlier assignment. If the agency requests the assignment of an ALJ, the case is immediately assigned. The ALJ may set the hearing date, conduct prehearing conferences and issue orders to establish case-specific procedures or resolve interim

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[27] TEX. GOV'T CODE ANN. ch. 2003.

[28] 1 TEX. ADMIN. CODE ch. 155 (West 2005); TEX. GOV'T CODE ANN. § 2003.050.

[29] TEX. GOV'T CODE ANN. § 2003.050 and § 2001.058(c).

[30] A contract between SOAH and the agency is required. *See* TEX. GOV'T CODE § 2003.024.

disputes. More complex cases usually are referred to the SOAH through a request for assignment of an ALJ.

SOAH rules provide that requests for relief not made during the hearing or at a prehearing conference must be in writing, filed with the SOAH (and the referring agency, if the rules for that agency so provide), and served on all parties. Service should be made and response time allowed before a ruling is expected.

An ALJ has the authority on his/her own motion or on motion of a party, after notice and hearing, to impose sanctions in certain instances.[31] Sanctions can be imposed for discovery abuses, pleading abuses and failure to obey certain ALJ orders.[32]

The APA allows an occupational licensing agency, by rule, to have the ALJ render the final decision in a contested case brought by the agency. For these agencies, the ALJ is required to render a decision within 60 days after the close of the hearing or deadline for filing briefs or other post-hearing documents.[33] The decision deadline may be extended only with the consent of all parties.

For other agencies as well as occupational licensing agencies that retain the power to render the final decision, the ALJ issues a written Proposal for Decision (PFD) for consideration by the referring agency.[34] The ALJ issues a PFD after hearing the evidence and final oral or written arguments by the parties.

The Utility Team of SOAH conducts telephone and electric utility case hearings for the Public Utility Commission of Texas (PUC), including contested telephone and electric rate cases, applications for certificates of convenience and necessity for electric transmission lines, applications for telephone certificates of operating authority and service provider certificates of operating authority, utility merger applications and complaint cases. These cases are generally governed by the SOAH's Rules of Procedure and the PUC's Rules of Practice and Procedure, which grant the presiding officer broad discretion in determining the course, conduct and scope of the hearing.

The Natural Resources Team of SOAH conducts contested case hearings for the Texas Commission on Environmental Quality (TCEQ). The TCEQ regulates municipal and industrial solid waste disposal, hazardous waste activities, air quality, water quality, water rights, water utility matters and water well drilling activities throughout Texas. The TCEQ also has enforcement authority in environmental compliance matters. Hearings are primarily held in Austin, but many hearings are conducted, at least in part, throughout the state. Hearings conducted for the TCEQ by the SOAH are generally governed by the TCEQ's Procedural Rules and by the SOAH's rules.

The Administrative License Revocation Team of the SOAH holds driver's license hearings under the Administrative License Revocation program. These hearings are conducted all over the state, not

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31 TEX. GOV'T CODE ANN. § 2003.0421.

32 TEX. GOV'T CODE ANN. § 2003.0421(a).

33 TEX. GOV'T CODE ANN. § 2001.058(f).

34 TEX. GOV'T CODE ANN. § 2001.143(a); *Suburban Util. Corp. v. Public Util. Comm'n of Texas*, 652 S.W.2d 358, 361 (Tex. 1983); *Texas Health Enter. v. Texas Dep't Of Health*, 925 S.W.2d 750, 756 (Tex.App.—Austin 1996), *rev'd per curiam*, 949 S.W.2d 313 (Tex. 1997).

just in Austin. These hearings are governed by the SOAH's rules as well as by the Texas Department of Public Safety's rules.

Discovery in Contested Cases

The APA provides for discovery once a notice of hearing has been issued. Under SOAH rules, discovery is available once SOAH acquires jurisdiction (when an agency files a Request to Docket Case form).[35] Discovery is the process by which parties in a contested case obtain information from each other about the matters at issue. The Texas Rules of Civil Procedure govern the discovery process for litigation in trial courts and are followed to some extent in contested cases.[36]

The APA and SOAH rules provide parties with a broad range of discovery tools. First may require, an agency may issue a subpoena upon a showing of good cause and, where non-parties are involved, the deposit of specified amounts of money.[37] The subpoena is to insure that a witness, either a party or a non-party, comes to the hearing. The subpoena may also require that the witness bring specified documents or things to the hearing. Unless the SOAH's rules specify otherwise, the state agency issues the subpoena, not the SOAH administrative law judge.[38]

Parties may also take the deposition of a witness. The state agency, and not the SOAH administrative law judge, may issue a commission to take a deposition upon the motion of any party to a contested case.[39] **[See Figure 17: Commission for Deposition.]** The APA specifies the format for the commission. Both parties and non-parties may be deposed upon the issuance of a commission; however, fees must be paid to depose non-parties.[40] The issuance of a commission is a ministerial task; an agency has virtually no discretion not to issue a properly filed commission. If the agency objects to the taking of a deposition, the attorney representing the agency in the case may file a motion to quash with the ALJ. Depositions may be used in the contested case hearing.[41]

The third type of discovery authorized by the APA is production of documents by parties to a contested case.[42] The party requesting production files a motion with notice to all parties. The agency has discretion to order or refuse to order production of documents. A request for production is the vehicle for parties to obtain the identities of parties or witnesses and reports of expert witnesses. The APA further authorizes a party to file a motion, similar to a motion for production of documents, to enter onto property to gather information material to the issues in a case.[43]

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35 TEX. GOV'T CODE ANN. §§ 2001.091-2001.093; 1 TEX. ADMIN. CODE §§ 155.7; 155.31(c)

36 TEX. GOV'T CODE ANN. § 2001.091(a); 1 TEX. ADMIN. CODE §§ 155.3(g), 155.31.

37 TEX. GOV'T CODE ANN. § 2001.089.

38 TEX. GOV'T CODE ANN. § 2003.050.

39 TEX. GOV'T CODE ANN. § 2001.094.

40 TEX. GOV'T CODE ANN. § 2001.103.

41 TEX. GOV'T CODE ANN. § 2001.102.

42 TEX. GOV'T CODE ANN. § 2001.091.

43 TEX. GOV'T CODE ANN. § 2001.091.

Finally, a person, party or non-party may obtain an order compelling a party to disclose a previously made statement.[44] The APA also allows parties to discover documents that may name possible parties, witnesses and reports made by experts.[45]

By rule, SOAH has provided to parties in contested cases other methods of discovery that are permitted under rules of civil procedure. Parties may obtain discovery by requests for disclosure, as described by Tex. R. Civ. P. 194; oral or written depositions; written interrogatories to a party; requests of a party for admission of facts and the genuineness or identity of documents or things; requests and motions for production, examination, and copying of documents and other tangible materials; motions for mental or physical examinations; and requests and motions for entry upon and examination of real property.[46]

Rules of privileges recognized by law may be asserted in contested cases to avoid discovery, such as the privileges provided in the Texas Rules of Civil Procedure and the Rules of Evidence.[47] The exceptions to disclosure of information in the Public Information Act are not privileges from discovery and may not be used to avoid producing otherwise discoverable matters.[48]

The Contested Case Hearing

Prior to proceeding on the merits of a complaint in a contested case hearing, proof of notice of the hearing must be established in the hearing record.[49] The agency must prove its compliance not only with the APA, but also with any additional requirements of the SOAH's and the agency's own statute or rules. For this reason, the Notice of Hearing should be sent by certified mail, with return receipt requested. At the start of the hearing, the agency should offer the "green card," which enters the receipt of the mail into evidence. If the "green card" is not available, the agency should be prepared to offer testimony or an affidavit proving that the notice was sent.

The agency's enabling statute or rule will establish the burden of proof on the issues before the ALJ. For denial or revocation of a license, the burden of proof is on the agency to establish, based on a preponderance of the evidence, the factual and legal basis for the action the agency wishes to take.[50] The agency need not prove its case "beyond a reasonable doubt," the standard in criminal cases.[51] Parties have the right to be represented by an attorney if they so choose.[52]

Agencies often ask whether an application for the renewal of a license should be considered during the pendency of a contested case regarding that license. The APA indicates that it is not necessary

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44 TEX. GOV'T CODE ANN. § 2001.093.

45 TEX. GOV'T CODE ANN. § 2001.092.

46 1 TEX. ADMIN. CODE § 155.31(d).

47 TEX. GOV'T CODE ANN. § 2001.083.

48 TEX. GOV'T CODE ANN. § 552.005(b).

49 *Tunnell v. Texas Real Estate Comm'n*, 761 S.W.2d 123, 124 (Tex.App.—Dallas 1988, no writ).

50 *Beaver Express Serv., Inc., et al., v. Railroad Comm'n of Texas*, 727 S.W.2d 768, 775 n.3 (Tex.App.—Austin, 1987, writ denied).

51 *Texas State Bd. of Dental Examiners v. Sizemore*, 759 S.W.2d 114, 116-17 (Tex. 1988), *cert. denied*, 109 S.Ct. 2100 (1989).

52 TEX. GOV'T CODE ANN. § 2001.053.

to consider an application for renewal of a license when there is a pending proceeding because the existing license remains in effect until the case is finally determined.[53]

Default Judgments

If a party without the burden of proof fails to appear in person, or by telephone as allowed by the SOAH procedural rules, the ALJ may, on motion of the other party, recommend to the referring agency the entry of a default judgment. A default judgment will be considered under this section only when the moving party can prove that proper notice of the hearing under the APA and the SOAH rules was given to the party that failed to appear. The notice must include a disclosure in 12 point bold type of the fact that on the failure of a party to appear, the factual allegations in the notice may be deemed admitted as true, and the relief sought may be granted by default.[54] **[See Figure 14: Notice of Hearing.]**

Evidence

All parties in a contested case are entitled to an opportunity to present and respond to evidence and argument.[55] The ALJ's decision is based on the facts proven through evidence admitted at the administrative hearing.[56] The form of evidence ordinarily includes documents, photographs, tangible objects and the testimony of witnesses, either live or by teleconference or video conference at the hearing or through depositions taken prior to the hearing. Typically, agencies offer certified copies of documents in an agency's files that were created in the course of an investigation leading up to a hearing. **[See Figure 18: Affidavit of Records Custodian.]**

Expert testimony is necessary to establish certain record evidence, such as a standard of care and whether a certain act or omission falls below the standard of care.[57] The professional staff of a state agency may provide this testimony. Generally, board members should not participate as witnesses in the hearing.[58] The administrative law judge resolves objections about whether any particular evidence is admissible.

Ex Parte Communications

An *ex parte* communication is a direct or indirect communication between a decision-maker in a contested case and any other person, without giving all parties to the contested case notice and an opportunity to participate in the communication. The APA provides a general prohibition on *ex parte* communication.[59]

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53 TEX. GOV'T CODE ANN. § 2001.054(b).

54 1 TEX. ADMIN. CODE § 155.55.

55 TEX. GOV'T CODE ANN. § 2001.051(2).

56 *Railroad Comm'n of Texas v. Lone Star Gas Co.*, 611 S.W.2d 908, 910 (Tex.App.—Austin 1981, writ ref'd n.r.e.).

57 *E. I. duPont de Nemours & Co. v. Robinson*, 923 S.W.2d 549 (Tex. 1995).

58 *Rogers v. Texas Optometry Bd.*, 609 S.W.2d 248 (Tex.App.—Dallas 1980, writ ref'd n.r.e.).

59 *Acker v. Texas Water Comm'n*, 790 S.W.2d 299, 300 (Tex. 1990).

> **Unless required for the disposition of an *ex parte* matter authorized by law, a member or employee of a state agency assigned to render a decision or to make findings of fact and conclusions of law in a contested case may not directly or indirectly communicate in connection with an issue of fact or law with a state agency, person, party, or representative of those entities, except on notice and opportunity for each party to participate.** [60]

The policy behind the prohibition on *ex parte* communication arises from the parties' rights to an unbiased decision-making process. *Ex parte* communications deprive the parties of a contemporaneous opportunity to communicate with the decision-maker. The *ex parte* prohibition reflects the requirement that decisions be based only on evidence in the administrative hearing record by limiting communications with decision-makers outside that record.[61] It is imperative, therefore, that no person, including the licensee or agency staff, contact the SOAH administrative law judge or board members who will be making the decision in a contested case.[62]

Findings of Fact and Conclusions of Law

The APA provides that a decision or order that may become final and that is adverse to a party in a contested case be in writing or stated in the record. It must include findings of fact and conclusions of law, separately stated.[63]

The APA's requirement for findings of fact and conclusions of law serves three primary purposes. First, the requirement encourages the decision-maker to fully consider the evidence. It acts as a check on agency action that might otherwise be based on a careless or arbitrary decision-making process. Second, the requirement for findings and conclusions insures that parties who may be adversely affected by an action are appraised fully of the facts upon which the action is based. If they are so informed, they may better prepare for and pursue an appeal. Finally, the findings and conclusions in final orders enable the courts to properly review such orders on appeal.[64] Findings of fact should be such that a court, on reading them, could fairly and reasonably say that the findings support the conclusions of law contained in the final order.[65]

Findings of fact and conclusions of law must be based only on record evidence or matters officially noticed.[66] Certain enabling statutes set forth criteria that must be met before the agency can take

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60 TEX. GOV'T CODE ANN. § 2001.061(a).

61 *County of Galveston v. Texas Dep't of Health*, 724 S.W.2d 115, 119-124 (Tex.App.—Austin 1987, writ ref'd n.r.e.).

62 *See also* TEX. GOV'T CODE ANN. § 2003.0412 (extending *ex parte* communication prohibition to SOAH matters).

63 TEX. GOV'T CODE ANN. § 2001.141.

64 *Texas Health Facilities Comm'n v. Charter-Medical Dallas, Inc.*, 665 S.W.2d 446, 452 (Tex. 1984).

65 *Texas Health Facilities Comm'n v. Presbyterian Hosp. North*, 690 S.W.2d 564, 567 (Tex. 1985).

66 TEX. GOV'T CODE ANN. § 2001.141(c); *State Banking Bd. v. Allied Bank Marble Falls*, 748 S.W.2d 447 (Tex. 1988).

action in particular instances; these criteria must be reflected in findings of fact and conclusions of law.[67]

Proposal for Decision

Following the close of the record, the ALJ will prepare a Proposal for Decision (PFD). **[See Figure 19: Proposal for Decision.]** In a contested case not heard by the SOAH, the agency's hearings examiner will usually issue a PFD. A PFD must be issued if the board members have not heard the case or read the hearing record, and the decision is adverse to a party other than the agency.[68]

The PFD must contain a statement of the reasons for the decision and each finding of fact and conclusion of law necessary to support the proposed decision. The PFD may contain a procedural and factual history of the case, an analysis of the evidence and a summary of the administrative law judge's recommendation.

After the PFD has been served on all parties, the parties may file exceptions to the PFD and replies to exceptions to the PFD. The ALJ may amend the PFD in response to exceptions and replies to the exceptions.[69] At a public meeting, the board must consider the PFD and decide whether to accept the recommended findings of fact and conclusions of law and the sanction to be imposed. At the meeting, the ALJ may present the final PFD to the governing body of the agency.

Changing an ALJ's Proposed Findings of Fact and Conclusions of Law

The APA sets out the parameters of an agency's discretion to change the findings of fact and conclusions of law proposed by an ALJ.[70] When an agency seeks to change an ALJ's finding of fact or conclusion of law, it must state in writing its reasons for each change and the legal basis for it, usually in the final order.

A state agency is not prevented from rejecting an ALJ's recommended sanction. Within the bounds of its statutory authority, an agency has broad discretion to determine the appropriate sanction when a violation of the licensing statute or rule has been established.[71] For this reason, agencies may

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[67] *Texas Health Facilities Comm'n v. Charter-Medical Dallas, Inc.*, 665 S.W.2d 446, 452 (Tex. 1984); *Professional Mobile Home Transport v. Railroad Comm'n of Texas*, 733 S.W.2d 892, 897 (Tex.App.—Austin 1987, writ ref'd n.r.e.).

[68] TEX. GOV'T CODE ANN. § 2001.062.

[69] TEX. GOV'T CODE ANN. § 2001.062(d); 1 TEX. ADMIN. CODE § 155.59(c).

[70] TEX. GOV'T CODE ANN. § 2001.058(e) *See* F. Scott McCown and Monica Leo, *When Can An Agency Change the Findings or Conclusions of an Administrative Law Judge, Part Two,* 51 Baylor L. Rev. 63 (Winter, 1999); *When Can An Agency Change the Findings or Conclusions of an Administrative Law Judge*, 50 Baylor L. Rev. 65 (Winter 1998).

[71] *Fay-Ray Corp. v. Texas Alcoholic Beverage Comm'n*, 959 S.W.2d 362 (Tex.App.–Austin 1998, no writ) ("an agency has broad discretion in determining which sanction best serves the statutory policies committed to the agency's oversight"); *Firemen's & Policemen's Civil Service Comm'n v. Brinkmeyer*, 662 S.W.2d 953 (Tex. 1984) ("The propriety of a particular disciplinary measure . . . is a matter of internal administration with which the courts should not interfere . . ."); *Emory v. Texas State Bd. of Medical Examiners*, 748 F.2d 1023 (5th Cir. 1984) (". . .an agency's decision in determining an appropriate penalty will not be reversed unless an abuse

impose a sanction not recommended by the ALJ even if the ALJ's recommendation is couched as a conclusion of law. An agency is not required to give presumptively binding effect to an ALJ's recommendations regarding sanctions in the same manner as with other findings of fact and conclusions of law.[72] The APA does allow an occupational licensing agency, by rule, to delegate to the SOAH ALJ the authority to make the final decision in a licensing case.[73]

Final Order

As previously discussed, the final order rendered in a contested case must be in writing or stated in the record.[74] The final order must contain findings of fact and conclusions of law, separately stated.[75] If the order requires the respondent to perform a certain act, the effective date of that performance should be clearly spelled out in the order. For instance, the beginning date of a license suspension should be separately stated from the effective date of the order. A contingency clause in case the order is appealed should also be included. All board members voting in favor of the order should sign a written order. **[See Figure 20: Final Order.]** All parties to a contested case must be notified of the final order, either in person or by first class mail.[76]

Motion for Rehearing and Judicial Review of Contested Cases

The Administrative Procedure Act states:

> **A person who has exhausted all administrative remedies available within a state agency and who is aggrieved by a final decision in a contested case is entitled to judicial review under this chapter.**[77]

A party who wishes to challenge a final decision must first file a motion for rehearing with the agency, which the agency may grant or deny.[78] **[See Figure 21: Receipt of Motion for Rehearing and Figure 22: Board Action on Motion for Rehearing.]** A party has 20 days from the date of notification of the agency's decision or order.[79] A party or attorney of record notified by mail of the agency's final action is presumed to have been notified on the third day after the date on which the notice is mailed.[80] Unless acted on by the agency, the motion for rehearing is overruled by operation of law 45 days after the date of notification.[81] An agency is not required to notify a party that the

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of discretion is shown.").

72 *Granek v. Texas State Bd. Of Medical Examiners,* 712 S.W.3d 761, 781 (Tex. App. - Austin 2005, no pet); *Grotti v. Texas State Bd. Of Medical Examiners,* 2005 WL 2464417 (Tex. App. - Austin 2005) (not reported).

73 TEX. GOV'T CODE ANN. § 2001.058(f).

74 TEX. GOV'T CODE ANN. § 2001.141(a).

75 TEX. GOV'T CODE ANN. § 2001.141(b).

76 TEX. GOV'T CODE ANN. § 2001.142(a).

77 TEX. GOV'T CODE ANN. § 2001.171.

78 TEX. GOV'T CODE ANN. § 2001.145.

79 TEX. GOV'T CODE ANN. §§ 2001.142 and 2001.146.

80 TEX. GOV'T CODE ANN. § 2001.142(c).

81 TEX. GOV'T CODE ANN. §§ 2001.142 and 2001.146(c).

motion for rehearing has been overruled by operation of law. Lack of notice in this respect does not toll the deadline for filing an appeal.[82]

The motion for rehearing is one last opportunity for the agency to correct any errors a party brings to the agency's attention. The agency has no authority to rehear a case on its own motion after overruling a motion for rehearing or after an order is final by operation of law.[83] An agency's refusal to grant a rehearing does not constitute arbitrary and capricious action warranting a reversal by a district court, unless a clear abuse of discretion is demonstrated.[84]

An appealing party has 30 days from the date the motion for rehearing is overruled to file a lawsuit in district court to review the agency's decision.[85] The procedural prerequisites to an appeal of a final order are mandatory and jurisdictional; they cannot be waived and must be strictly followed.[86] For example, the appealing party must have filed a motion for rehearing, and an appeal is limited in court to matters raised in the motion for rehearing.[87] A motion for rehearing must notify the agency of the error claimed so that the agency can either correct or defend the error.[88] A motion for rehearing can be "so indefinite, vague and general as to constitute no motion for rehearing at all."[89] Under these circumstances, the agency may be able to get an appeal of its order dismissed on the grounds that the plaintiff has failed to invoke the jurisdiction of the court. Absent specific legislative authority, there is no inherent right to judicial review of an administrative agency decision.[90] The APA grants a right to judicial review, and an agency's enabling statue may also expressly provide a right of judicial review.[91]

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82 *Hernandez v. Texas Dep't of Ins.*, 923 S.W.2d 192 (Tex.App.—Austin 1996, no writ).

83 *Young Trucking, Inc. v. Railroad Comm'n of Texas*, 781 S.W.2d 719, 720 (Tex.App.—Austin 1989, no writ); *Sexton v. Mount Olivet Cemetery Ass'n*, 720 S.W.2d 129, 145-46 (Tex.App.—Austin, 1986, writ ref'd n.r.e.).

84 *R. D. Oil Co. v. Railroad Comm'n of Tex.*, 849 S.W.2d 871, 875 (Tex.App.–Austin 1993, no writ.); *Texas State Bd. of Dental Examiners v. Silagi*, 766 S.W.2d 280, 285 (Tex.App.—El Paso 1989, writ denied).

85 TEX. GOV'T CODE ANN. §§ 2001.144 and 2001.176.

86 TEX. GOV'T CODE ANN. § 311.034; *see also Grounds v. Tolar ISD*, 707 S.W.2d 889, 891 (Tex. 1986); *Lindsay v. Sterling*, 690 S.W.2d 560, 563 (Tex. 1985); *Hill v. Board of Trustees*, 40 S.W.3d 676 (Tex.App.—Austin 2001, no pet.); *Butler v. State Bd. of Educ.*, 581 S.W.2d 751 (Tex.Civ.App.—Corpus Christi 1979, writ ref'd n.r.e.).

87 *Hill*, 40 S.W.3d at 679; *Burke v. Central Educ. Agency*, 725 S.W.2d 393 (Tex.App.—Austin 1987, writ ref'd n.r.e.).

88 *Suburban Util. Corp. v. Public Util. Comm'n*, 652 S.W. 358, 365 (Tex. 1983); *Hamamcy v. Texas State Bd. of Medical Examiners*, 900 S.W.2d 423, 425 (Tex.App.—Austin1995, writ denied).

89 *Hamamcy,* 900 S.W.2d 423, 425, *citing, Testoni v. Blue Cross and Blue Shield of Texas, Inc.,* 861 S.W.2d 387, 391 (Tex.App.–Austin 1992, no writ); and *Burke v. Central Educ. Agency,* 725 S.W.2d 393, 397 (Tex.App.–Austin 1987, writ ref'd n.r.e.).

90 *Southwest Airlines Co. v. Texas High-Speed Rail Auth.*, 867 S.W.2d 154 (Tex.App.—Austin 1993, writ denied); *Burkhalter v. Texas State Bd. of Medical Examiners*, 918 S.W.2d 1 (Tex.App.—Austin 1996, no writ).

91 *Texas Dep't. of Protective and Regulatory Serv. v. Mega Child Care, Inc.*, 145 S.W.3d 170 (Tex. 2004).

Once an appeal of an administrative order is filed in the district court, the court or a party may, by motion, ask that the case be transferred to the Third Court of Appeals for review, without a decision from the district court. In order for a transfer to be granted, the district court has to find that the public interest requires a prompt, authoritative ruling on the legal issues and that the case would ordinarily be appealed. Both courts must concur in the transfer. Once the court of appeals grants transfer, the decision of the agency is subject to review by the court of appeals, and the administrative record and the district court records are filed with the appellate court. [92]

Substantial Evidence Review Versus *De Novo* Review

Judicial review of agency actions subject to the APA are of two types: substantial evidence review and *de novo* review. Substantial evidence review requires that the court determine whether the evidence as a whole is such that reasonable minds could have reached the same conclusion the agency reached.[93] In *de novo* review, the reviewing court tries all issues of fact and law as if the agency had not acted.[94] An agency's enabling statute specifies which of these two standards of review is applicable. If the enabling statute is silent, the APA provides for substantial evidence review.[95]

In a substantial evidence appeal, the reviewing court may affirm the final order in whole or in part. The reviewing court may reverse or remand the case to the administrative agency if:

> **... substantial rights of the [plaintiff] have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:**
>
> **(A) in violation of constitutional or statutory provision;**
>
> **(B) in excess of the agency's statutory authority;**
>
> **(C) made through unlawful procedure;**
>
> **(D) affected by any other error of law;**
>
> **(E) not reasonably supported by substantial evidence considering the reliable and probative evidence in the record as a whole; or**
>
> **(F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.**[96]

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92 TEX. GOV'T CODE ANN. § 2001.176(c).

93 *Dotson v. Texas Bd. of Medical Examiners*, 612 S.W.2d 921, 922 (Tex. 1981); *Texas State Bd. of Dental Examiners v. Sizemore*, 759 S.W.2d 114, 116 (Tex. 1988), *cert. denied*, 109 S.Ct. 2100 (1989).

94 TEX. GOV'T CODE ANN. § 2001.173; *Central Educ. Agency v. Upshur County Comm'r Court*, 731 S.W.2d 559, 561 (Tex. 1987).

95 TEX. GOV'T CODE ANN. § 2001.174.

96 TEX. GOV'T CODE ANN. § 2001.174(2).

Substantial evidence review requires that the agency transmit an original or certified copy of the administrative record to the reviewing court.[97] **[See Figure 23: Affidavit Certifying Administrative Record.]** The record in a contested case contains, among other things, the hearing record, including all evidence admitted and matters officially noticed, the pleadings filed by the parties, the PFD and the Final Order.[98] The agency is required to prepare and file either the original record or a certified copy with the clerk of the district court. The record filed with the clerk may be shortened by agreement.[99]

Under the substantial evidence standard of review, the court may not hear new evidence, except in the most limited circumstance.[100] The appealing party has the burden of proof to demonstrate invalidity of the final order or an absence of substantial evidence.[101] The court, therefore, must presume that the agency's final order is valid and supported by substantial evidence.[102]

De novo review, in contrast to substantial evidence review, authorizes the reviewing court to conduct an evidentiary hearing on the very same issues presented at the administrative hearing. The administrative record in a *de novo* appeal is not required except to show that the district court has jurisdiction to hear the case.[103] The reviewing court will essentially decide the case anew by hearing evidence from all parties.[104]

Suits for review under the substantial evidence rule do not affect the enforcement of an agency's final order.[105] Therefore, when an agency has revoked or suspended a professional license, the licensee seeking judicial review of the final order may seek an injunction to prevent the enforcement of the final order.[106] Some enabling statutes set out the circumstances under which a court may enjoin the agency's order pending appeal. On the other hand, under *de novo* review, filing an appeal vacates the agency's final order, and thereby vacates an agency's decision revoking or suspending a license.[107]

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97 TEX. GOV'T CODE ANN. § 2001.175(b).

98 TEX. GOV'T CODE ANN. § 2001.060.

99 TEX. GOV'T CODE ANN. § 2001.175.

100 TEX. GOV'T CODE ANN. § 2001.175(c) and (e). The court may consider evidence of procedural irregularities that are not reflected in the agency record. The court may remand the case to the agency to allow the presentation of additional evidence on the substance of the case if the evidence is material and there was good cause for not offering it at the original administrative hearing.

101 *Vandygriff v. First Saving & Loan Ass'n of Borger*, 617 S.W.2d 669, 673 (Tex. 1981); *Auto Convoy Co. v. Railroad Comm'n of Texas*, 507 S.W.2d 718, 722 (Tex. 1974).

102 *State v. Public Util. Comm'n*, 883 S.W.2d 190, 204 (Tex. 1994).

103 TEX. GOV'T CODE ANN. § 2001.173.

104 *Commercial Life Ins. Co. v. Texas State Bd. of Ins.*, 808 S.W.2d 552, 554 n.3(Tex.App.—Austin 1991, writ denied).

105 TEX. GOV'T CODE ANN. § 2001.176(b)(3); *Texas State Bd. of Pharmacy v. Seely*, 764 S.W.2d 806, 815 (Tex.App.—Austin 1988, writ denied).

106 Generally, the district court will grant a temporary injunction to enjoin the effect of the final order entered by the agency in substantial evidence review case if the party seeking judicial review of the final order can show a probable right to recover the relief sought and a probable irreparable injury if the relief sought is not granted. *Transport Co. of Texas v. Roberston Transports, Inc.*, 261 S.W.2d 549, 552 (Tex. 1953). A temporary injunction's purpose is to maintain the *status quo* during the pendency of litigation, until further order of the court or an adjudication of the case by a trial on the merits. *Davis v. Huey*, 571 S.W.2d 859, 862 (Tex. 1978).

107 TEX. GOV'T. CODE ANN. § 2001.176(b)(3).

Figure 1: Complaint Form

[AGENCY]
[ADDRESS]
[PHONE]

GENERAL COMPLAINT FORM

Please complete this form in sufficient detail for us to determine whether an investigation is warranted, and, if so, to be able to proceed with an investigation. If an investigation is warranted, a copy of your completed complaint form will be provided to the individual being complained against (respondent) and the respondent will be asked to respond to your complaint. You will be informed in writing of the status of the investigation.

PLEASE TYPE OR PRINT IN INK:

COMPLAINANT INFORMATION:

_____
Your Name

_____
Address

_____
City, State and Zip Code

_____
Home Telephone

_____
Business Telephone

RESPONDENT INFORMATION:

_____
Name of individual or firm complained against

_____
Address

_____
City, State and Zip Code

_____
Telephone

Did you sign a contract? _____ If so, please attach a copy.

Have you made your complaint known to the respondent? _____

Date of Transaction/Incident: _____

State the details of your complaint, including all relevant transactions and dealings with the respondent (you may attach a letter to this form). Include the names of individuals with whom you have dealt and the dates of your dealings. Enclose copies of all contracts, receipts, correspondence and other documents relating to the complaint. List the names, addresses and phone numbers of any other witnesses.

_____

_____

_____

_____

_____ _____
Complainant Signature Date

Figure 2: Acknowledgment of Complaint Letter

[DATE]

Mr. Iam Irritated
Woeisme and Company
P. O. Box 100
Yourtown, TX 77777

Re: Case #_____

Dear Mr. Irritated:

This letter is to acknowledge receipt of your complaint against Decipher Business. A copy of your complaint has been sent to Dr. Joe Sphinx, D.H., Licensee.

Dr. Sphinx has been requested to reply in writing regarding the circumstances surrounding your complaint. When his reply is received, the complaint will be investigated by our Enforcement Committee.

Any further correspondence regarding this issue should be referred to the attention of the [Complaint Department or Name of Investigator]. Please include the above case number in all future correspondence.

You will be notified of the final disposition of this matter. Our investigator may be contacting you in the interim to discuss this matter further. Thank you for bringing it to our attention.

Sincerely,

Board Contact

BC:nc

Figure 3: Notification of Complaint

[DATE]

Dr. Joe Sphinx, D. H.
Decipher Business
123 Trouble Hwy.
Yourtown, TX 72777

Re: Case #_____

Dear Dr. Sphinx:

A complaint from Mr. Iam Irritated has been received in our office dated [DATE]. A copy of his complaint is enclosed. The Enforcement Committee investigates all complaints. You are required by Board rules to respond, in writing, within 15 days of receipt of this letter, as to the circumstances surrounding the enclosed complaint. Your response is your opportunity to answer the allegations that have been made and to show that you have complied with all requirements of law, including the Hieroglyphic Act, Occupations Code ch. XIX and Board rules, IXX TAC §§ i.i through iv.x, for the retention of your license to practice hieroglyphic in Texas.

Your reply will be reviewed by our Enforcement Committee, and you will be notified of future actions by that committee. Any further questions you have should be addressed through correspondence to the [Complaint Department OR Name of Investigator]. Please include the above case number in all future correspondence. Thank you for your attention to this matter.

Sincerely,

Board Contact

BC:nc
encl.
CM RRR No.

Figure 4: Request to Third Party for Information

[DATE]

Ms. Ima Witness
112 Bystander Way
Yourtown, TX 72777

Re: Dr. Joe Sphinx, D.H.
Case #

Dear Ms. Witness:

This letter is to notify you that an investigation is being conducted regarding the professional practices of the above-named individual. It is alleged that Dr. Sphinx did not properly perform hieroglyphic services at the Woeisme Company, on or about [INSERT DATE OF INCIDENT].

We understand you have information concerning this matter, and your cooperation and assistance are requested. Please contact me at [PHONE] Mon.-Fri. 8:00 a.m.-4:30 p.m. as soon as possible to discuss this matter.

Our office cannot accept collect calls; however, we will return your call so that you do not accrue any additional expense. If I am out of the office when you call, please leave your name and telephone number, and I will return your call.

Thank you in advance for your cooperation.

Sincerely,

Board Investigator

BC:nc

Figure 5: Informal Conference Procedures

STATEMENT OF INFORMAL CONFERENCE PROCEDURES

You have received a copy of the complaint and the allegations made against you pertaining to alleged violations or grounds to take disciplinary action against you under [AGENCY ENABLING STATUTE OR AGENCY RULES]. This informal conference was scheduled to give you an opportunity to refute those allegations, in whole or in part, and to potentially avoid the necessity of a formal hearing. You should be aware of the following standards that apply to the prehearing conference:

1) You have the right to be represented by an attorney in the informal conference. At any time, should you decide you would prefer to have an attorney, please advise us immediately, and we will discontinue the informal conference.

2) You may be asked questions during the informal conference. You may decline to answer any questions posed to you.

3) Your participation in the informal conference is voluntary, and you may terminate the conference at any time. The agency may also terminate the informal conference at any time. If the informal conference is terminated by either party, that does not prevent the agency from proceeding with a formal hearing. You are encouraged to cooperate fully with the Enforcement Committee to ensure that it has all pertinent information relating to the complaint against you.

4) A verbatim transcript is not being kept of this informal conference; however, outline notes will be made and may be used at a formal hearing if this matter is docketed as a formal complaint with the State Office of Administrative Hearings. [Some enabling statutes prohibit a record]

Should you have any questions, please bring them to the attention of the Enforcement Committee or consult your attorney, if you have retained legal counsel.

By placing your signature below, you indicate that you have read and understood this Statement of Informal Conference Procedures.

_____ _____

Name Date

Figure 6: Offer of Informal Conference

[DATE]

Dr. Joe Sphinx, D.H.
Decipher Business
123 Trouble Hwy.
Yourtown, TX 72777

Re: Case #_____

Dear Dr. Sphinx:

The TBHE has information on file that you have allegedly violated certain sections of the Hieroglyphic Act, Occupations Code ch. XIX and Board rules, IXX TAC §§ i.i through iv.x, as described in the complaint previously sent to you and further identified in the allegations attached to this letter.

This is to advise you that, in accordance with the Texas Administrative Procedure Act, the Board is offering you the opportunity to respond in person, through an informal conference, to the matters set forth in this letter and in the attached allegations. At such a conference, you have the right to be represented by counsel if you desire. After the informal conference, the Enforcement Committee will decide whether to take no further action, to continue investigating, or to take disciplinary action relating to your license.

A conference date has been set for [DATE] at [TIME] here in the Board's office.

Please contact this office upon receipt of this letter to confirm the conference appointment. If you fail to attend the conference, your file will be referred to the Enforcement Committee for appropriate action, including scheduling a formal hearing before an Administrative Law Judge with the State Office of Administrative Hearings.

Sincerely,

Board Contact

BC:nc
encls.
CM RRR No.

Figure 7: Allegations

EXHIBIT A — ALLEGATIONS

On or about November 10, 2004, Dr. Joe Sphinx, D.H., License No. XXXXXXX, agreed to perform a hieroglyphic examination and to treat hieroglyphic writings on the building of the Woeisme Business. Section XIX.xx(1) and (2) of the Hieroglyphic Act and Board rule, IXX TAC § iv.v. require that a licensee carefully preserve any hieroglyphic writings during the course of an examination and treatment in a safe and hieroglyphically sound manner. Instead Dr. Sphinx applied a common household cleaner, "409," with an SOS pad without first administering a pre-application test. As a result, the writings dissolved. Such treatment has been an unacceptable practice of care in the hieroglyphic profession since the early 1960s. By such course of action, Dr. Sphinx has violated the above cited provisions of the Hieroglyphic Act and Board rules.

The Board requested Dr. Sphinx's cooperation in the investigation of this complaint and required him to provide the Board with a written reply. All licensees are required to cooperate with a board investigation, including responding to a written complaint upon the request of the Board. Dr. Sphinx was silent and refused to answer the Board's inquiry in violation of section XIX.xx (10) of the Hieroglyphic Act and Board rule, IXX.TAC § iv.x.

Copies of the Hieroglyphic Act and Board Rules are enclosed for your review.

Figure 8: Notification of No Action Decision

[DATE]

Dr. Joe Sphinx, D.H.
Decipher Business
123 Trouble Hwy.
Yourtown, TX 72777

Re: Case #_____

Dear Dr. Sphinx:

An informal conference was held in the offices of [AGENCY], on [DATE].

As a result of this conference, it is the decision of the Enforcement Committee that no action be taken against your professional license.

Accordingly, the investigation is closed. If you have any questions concerning this matter, please contact me.

Sincerely,

Board Contact

BC:nc
CM RRR NO.

Figure 9: Proposed Agreed Order Cover Letter

[DATE]

Dr. Joe Sphinx, D.H.
Decipher Business
123 Trouble Hwy.
Yourtown, TX 72777

Re: Case # _____

Dear Dr. Sphinx:

You were previously advised that this office was investigating allegations regarding your professional practice.

The investigation has produced evidence of a violation of Hieroglyphic Act, Occupations Code ch. XIX and Board rules, IXX TAC §§ i.i through iv.x.

You are entitled to a formal Complaint, Notice of Hearing, and an opportunity for a hearing in which you may present evidence on all relevant matters and cross examine witnesses before any action is taken against your license. You are also entitled to representation by an attorney if you desire. However, at this time, you are offered an alternative to a formal hearing.

Enclosed you will find a proposed Agreed Final Order specifying Findings of Fact and Conclusions of Law. It also sets out a sanction of a 60-day suspension of your license. If you agree with this sanction and wish to resolve this matter informally, please sign the Agreed Final Order promptly before a Notary Public and return it to our office within thirty (30) days. The Agreed Final Order does not become effective until it is accepted by the full Board and signed by the Board or its designated representative. If the Board approves the Agreed Final Order, a copy of the executed order will be sent to you for your files. If the full Board chooses not to sign the Agreed Final Order, an alternative order may be sent to you and you will have the opportunity to accept that order if you choose.

If you choose not to sign this Agreed Final Order, please advise us in writing. If we do not hear from you within 30 days of the date of this letter, this matter will be set for a hearing before an Administrative Law Judge with the State Office of Administrative Hearings. You will receive advance notice of the hearing.

Sincerely,

Board Contact

BC:nc
encl.
CM RRR NO.

Figure 10: Final Agreed Order

TBHE Docket No. _____

IN THE MATTER	§	BEFORE THE TEXAS BOARD
OF	§	OF
JOE SPHINX, D.H.	§	HIEROGLYPHIC EXAMINERS
LICENSE NO. XXXXXXXXXX.	§	

AGREED FINAL ORDER

On this _____ day of _____, 200_, the Texas Board of Hieroglyphic Examiners considered the matter of the license of JOE SPHINX, D.H., Respondent.

This Agreed Order is executed pursuant to the authority of the Administrative Procedure Act (APA), Tex. Gov't Code § 2001.056, which authorizes the informal disposition of contested cases. In a desire to conclude this matter without further delay and expense, the Board and Respondent agree to resolve this matter by this Agreed Final Order. The Respondent agrees to this order for the purpose of resolving this proceeding only and without admitting or denying the findings of fact and conclusions of law set out in this Order.

Upon recommendation of the Enforcement Committee, the Board makes the following findings of fact and conclusions of law and enters this order:

FINDINGS OF FACT

1. JOE SPHINX, D.H., Respondent, is a hieroglyph licensed by the Board to practice hieroglyphic in the State of Texas and is, therefore, subject to the jurisdiction of the Board and the Hieroglyphic Act, Occupations Code, ch. XIX and Board rules, IXX TAC §§ i.i through iv.x.

2. A complaint was filed against Respondent on _____, and he was provided with the opportunity to respond to the complaint and to show compliance with the law.

3. The complaint alleged that Respondent during an examination and treatment of the complainant's building failed to preserve and repair the building's hieroglyphic writings in a safe and hieroglyphically sound manner in violations of section XIX.xx(1) and (2) of the Hieroglyphic Act and Board rule, IXX TAC § iv.v. Moreover, when asked about these allegations, Dr. Sphinx was silent and refused to answer the Board's inquiry in violation of section XIX.xx(10) of the Hieroglyphic Act and Board rule, IXX TAC § iv.x.

4. The Enforcement Committee of the Board held an informal conference on _____, 200__, which the Respondent, [with counsel] attended. Enforcement Committee members, _____, were present.

CONCLUSIONS OF LAW

1. JOE SPHINX, D.H. is subject to the jurisdiction of this Board and is required to comply with the Hieroglyphic Act, Occupations Code, ch. XIX and Board rules, IXX TAC §§ i.i through iv.x.

2. Section XIX.xx of the Hieroglyphic Act provides for the disciplining of a licensee who fails to preserve and repair a building's hieroglyphic writings in a safe and hieroglyphically sound manner and who fails to respond to Board inquiries.

3. Such conduct is a violation of Occupations Code § XIX.xx(1) , (2) and (10) and Board rules IXX TAC §§ iv.v, iv.x. [insert all applicable sections of Act and/or rules].

NOW, THEREFORE, it is the ORDER of the Texas Board of Hieroglyphic Examiners that:

1. JOE SPHINX, D.H., Respondent

    a. have his license to practice hieroglyphic suspended for 60 consecutive days, commencing on the first Monday following two weeks from the date of approval of this order by the Board, this order being final on the date of approval. The Respondent shall notify the Board in writing that he has begun the down time (suspension) on the date specified, and the date the down-time ends;

Figure 10: Final Agreed Order (continued)

b. during the period of suspension, shall not realize any remuneration from his hieroglyphic practice, and he may not at any time be in attendance in his office when it is open for business, and he may not provide hieroglyphic services to any person at any location. Respondent may arrange with another licensed hieroglyph to provide services to his current clients during the period of down time (suspension) so long as he does not receive any form of payment for hieroglyphic services rendered; and

c. comply with all provisions of the Hieroglyphic Act and Board rules in the future, or subject himself to further disciplinary action by the Board.

[insert any other conditions/restrictions]

2. This Order remains in full force and effect until Respondent fulfills all of its terms and conditions, including completion of the suspension, regardless of the date on which the suspension is begun.

3. The terms of this Agreed Final Order will be published in the Journal of the Texas Hieroglyphic Association.

4. Upon approval by the Board, the Chair of the Enforcement Committee and the Executive Director are authorized to sign this order on behalf of the Board.

[insert any other terms]
By signing this Agreed Final Order, Respondent:

1. agrees to its terms, acknowledges his understanding of it and agrees that he will satisfactorily comply with the mandates of this Order in a timely manner or be subject to appropriate disciplinary action by the Texas Board of Hieroglyphic Examiners; and

2. waives his right to a formal hearing and any right to judicial review of this Order.

I, JOE SPHINX, D.H., HAVE READ AND UNDERSTAND THE FOREGOING AGREED FINAL ORDER. I UNDERSTAND THAT BY SIGNING THIS AGREED FINAL ORDER, I WAIVE CERTAIN RIGHTS. I SIGN IT VOLUNTARILY, WILLINGLY, AND KNOWINGLY. I UNDERSTAND THIS AGREED FINAL ORDER CONTAINS THE ENTIRE AGREEMENT AND THERE IS NO OTHER AGREEMENT OF ANY KIND, VERBAL, WRITTEN OR OTHERWISE.

DATED: _____, 200__.

_____
JOE SPHINX, D.H.
[INSERT ADDRESS]

STATE OF TEXAS §
COUNTY OF _____ §

Before me, the undersigned notary public, on this day personally appeared JOE SPHINX, D. H., known to me (or proved to me on the oath of _____, or through _____ (description of identity card or other document)) to be the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

_____
Notary Public

Approved by a majority of the Texas Board of Hieroglyphic Examiners on _____,200__.

_____
Barbara Obelisk, D.H.
Chair, Enforcement Committee

_____
Mark Pharaoh
Executive Director

Figure 11: Proposed Voluntary Surrender of License Cover Letter

[DATE]

[LICENSEE NAME & ADDRESS]

RE: Case #_____
CERTIFIED MAIL, RRR # _____

Dear Dr. Sphinx:

You were previously advised that this office was investigating allegations regarding your professional practice.

The investigation has produced evidence of a violation of the [PRACTICE ACT], [GIVE STATUTORY CITATION, i.e. Occupations Code, Ch. ____], and Board Rules, ____ TAC §§ ____ through ____, specifically, Occupations Code § [STATUTORY BASIS FOR DISCIPLINE] and Board Rule [SPECIFIC RULE VIOLATED].

You are entitled to a formal Complaint, Notice of Hearing, and an opportunity for a hearing in which you may present evidence on all relevant issues and cross examine witnesses before any action is taken against your license. You are also entitled to representation by an attorney if you desire. However, at this time, you are offered an alternative to a formal hearing.

Enclosed you will find an affidavit by which you may surrender your license. If this is acceptable to you, please sign the affidavit before a Notary Public and return it to our office. [OPTIONAL: The affidavit is public information subject to disclosure under the Texas Public Information Act. If you choose to sign the affidavit, however, it will not be published in the agency newsletter sent to all licensees. If your license is revoked following a hearing, that information will be published in the agency newsletter.]

If you do not choose to sign the affidavit, please advise us in writing. If we do not hear from you within 20 days from receipt of this letter, we will continue this case through the normal enforcement process. You will be given advance notice of any hearing set on this case.

Sincerely,

[BOARD CONTACT]

encl.

Figure 12: Affidavit - Voluntary Surrender of License

STATE OF TEXAS §
§
COUNTY OF _____ §

AFFIDAVIT

BEFORE ME, the undersigned Notary Public, on this day personally appeared [LICENSEE], D.H., known to me (or proved to me on the oath of _____, or through _____ (description of identity card or other document)) to be the person whose name is subscribed below and who being by me duly sworn, deposes as follows:

"My name is [LICENSEE]. I am over 18 years of age, of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

I am a [LICENSED PROFESSION], licensed to practice by the [LICENSING AGENCY] (Board) in the State of Texas. I am voluntarily surrendering my license, No. _____, to the Board, because I no longer desire to be licensed.

I understand that complaints have been filed against me [AGENCY Nos. _____] and that the [ENFORCEMENT COMMITTEE/PERSON] has recommended disciplinary action. By executing this Affidavit, I neither admit nor deny the allegations against me. I understand that, through execution of this Affidavit, the Board may revoke my license without a formal hearing.

I hereby waive my right to a hearing on the complaints against me or to appeal or to otherwise complain of any final order entered by the Board accepting this voluntary surrender of my license."

Signed this _____ day of _____, 200__.

By:

_____
[LICENSEE'S NAME]

SWORN TO AND SUBSCRIBED before me by ___[LICENSEE]_____ on this _____ day of _____, 200__.

_____
Notary Public

Figure 13: Final Order - Revocation on Voluntary Surrender of License

BEFORE [AGENCY]
IN AND FOR THE STATE OF TEXAS
* *

In the matter of Permanent
License Number [NUMBER] issued
to [LICENSEE]

ORDER OF THE BOARD

WHEREAS, [LICENSEE] has submitted to the Board his/her affidavit that he/she no longer desires to be licensed as a [LICENSED PROFESSION], and that he/she is voluntarily surrendering his/her license, the Board takes the following action:

NOW, THEREFORE, IT IS ORDERED that License Number [NUMBER], issued to [LICENSEE], to practice [PROFESSION] in the State of Texas, be revoked without a formal hearing.

IT IS FURTHER ORDERED that the Executive Director is authorized to sign this order on behalf of the Board.

APPROVED BY A MAJORITY OF THE [AGENCY] ON THIS _____ DAY OF _____, 200__.

By:

_____
[EXECUTIVE DIRECTOR],
Executive Director

Figure 14: Notice of Hearing

[AGENCY]	§	
	§	
v.	§	Docket No. _____
	§	
[LICENSEE/ APPLICANT NAME]	§	

NOTICE OF HEARING

A hearing will be held before an Administrative Law Judge with the State Office of Administrative Hearings on [DATE], at or after [TIME], in [ROOM] of [BUILDING, ADDRESS].

The purpose of the hearing will be to determine whether [NAME OF LICENSEE/APPLICANT] has violated [AGENCY ENABLING STATUTE OR AGENCY RULES], by engaging in the alleged acts: [DESCRIBE ACTS]. These alleged acts are more fully described in the actual Complaint, attached to this Notice of Hearing and incorporated in this notice by this reference for all purposes. The hearing is being conducted under authority of [AGENCY ENABLING STATUTE] and the Administrative Procedure Act, Tex. Gov't Code ch. 2001, and in accordance with the procedures set out in Title 1 Texas Administrative Code, Chapter 155.

You have the right to be present at this hearing and to be represented by legal counsel. An Administrative Law Judge will be presiding at the hearing. All parties may present evidence and argument to the Administrative Law Judge regarding the charges noted above and in the formal Complaint. You are invited and urged to appear. Your failure to appear will not prevent the Administrative Law Judge from proposing a decision, or the Board from taking disciplinary action.

UPON YOUR FAILURE TO APPEAR AT THE HEARING, THE FACTUAL ALLEGATIONS IN THIS NOTICE AND THE COMPLAINT WILL BE DEEMED ADMITTED AS TRUE, AND THE RELIEF SOUGHT BY THE [AGENCY] MAY BE GRANTED BY DEFAULT.

_____
[EXECUTIVE DIRECTOR],
Executive Director

_____
[AGENCY]

Figure 15: Notice of Complaint

SOAH NO._____

TEXAS STATE BOARD OF	§	BEFORE THE STATE OFFICE
HIEROGLYPHIC EXAMINERS	§	
v.	§	OF
DR. JOE SPHINX, D. H.	§	
LICENSE NO. XXXXXXXX	§	ADMINISTRATIVE HEARINGS

COMPLAINT

COMES NOW, the Texas State Board of Hieroglyphic Examiners (Board), and makes this Complaint against Dr. Joe Sphinx, D.H. (Respondent), based on the alleged violations of the Hieroglyphic Act, Occupations Code ch. XIX and Board rules, IXX TAC §§ i.i through iv.x. The Board shall institute disciplinary action and provide for a hearing on the alleged violations as mandated by § XIX.iii(d) of the Hieroglyphic Act and IXX TAC § ii.iv.

In support of this Complaint and based on information and belief, the Board charges and alleges the following:

I.

1. Respondent holds Hieroglyphic License Number XXXXXXXX.
2. Respondent's Texas Hieroglyphic License was in full force and effect at all times and dates material and relevant to this Complaint.

II.

On or about November 10, 2001, Dr. Joe Sphinx, D.H. agreed to perform a hieroglyphic examination and to treat hieroglyphic writings on the building of the Woeisme Business. Section XIX.xx(1) and (2) of the Hieroglyphic Act and Board rule, IXX TAC § iv.v. require that a licensee carefully preserve any hieroglyphic writings during the course of an examination and treatment in a safe and hieroglyphically sound manner. Instead Dr. Sphinx applied a common household cleaner, "409," with an SOS pad without first administering a pre-application test. As a result, the writings dissolved. Such treatment has been an unacceptable practice of care in the hieroglyphic profession since the early 1960s. By such course of action, Dr. Sphinx has violated the above cited provisions of the Hieroglyphic Act and Board rules.

The Board requested Dr. Sphinx's cooperation in the investigation of this complaint and required him to provide the Board with a written reply. All licensees are required to cooperate with a board investigation, including responding to a written complaint upon the request of the Board. Dr. Sphinx was silent and refused to answer the Board's inquiry in violation of section XIX.xx (10) of the Hieroglyphic Act and Board rule, IXX.TAC § iv.x.

Respondent's conduct constitutes grounds for disciplinary action by the Board pursuant to Section XIX.xx of the Hieroglyphic Act, which states "[t]he Board shall revoke or suspend a license, probate a license suspension, or reprimand a licensee for any violations of this Act or rules of the Board."

PRAYER

WHEREFORE, PREMISES CONSIDERED, the Texas State Board of Hieroglyphic Examiners prays that a hearing on this complaint be held and that an Order be entered to revoke or suspend Respondent's Hieroglyphic License. In the event Respondent's Hieroglyphic License is not revoked or suspended, the Board prays that other means of discipline be imposed.

Respectfully submitted,

ATTORNEY FOR TEXAS BOARD OF
HIEROGLYPHIC EXAMINERS

Figure 16: Request to Docket Case

(Revised - 12/13/05)	FOR SOAH USE ONLY	(req.frm
Date complete request received by SOAH:	Proceeding date set by SOAH:	SOAH Docket Number& type of case:

REQUEST TO DOCKET CASE (Please type or print)

PLEASE CHECK ACTION(S) REQUESTED:**

☐ *SETTING OF HEARING* ☐ *ASSIGNMENT OF ALJ** ☐ *ALTERNATIVE DISPUTE RESOLUTION (ADR)/MEDIATION**

REFERRING AGENCY NAME: _____ AGENCY NO.: _____ AGENCY'S FILE/CASE NO.: _____

NAME/STYLE OF THE CASE: _____

DATE APPLICATION FILED AT AGENCY : _____ DOCKET NO. SUFFIX, if applicable: _____

PROCEEDING DATE(S) REQUESTED (Include range of dates if possible): _____

EXPECTED NUMBER OF HOURS (If less than a day) OR DAYS NEEDED FOR PROCEEDING: _____ HOURS _____ DAYS

☐ *ADMIN. FINE* ☐ *GRIEVANCE* ☐ *ENFORCEMENT* ☐ *CONTRACT CLAIM (Govt. Code 2260)* ☐ *OTHER* _____

SPECIAL NEEDS OR ACCOMMODATIONS: _____

IF ADR REQUESTED PLEASE DESCRIBE PROCESS NEEDED: _____

☐ PREHEARING CONFERENCE REQUESTED

☐ CASE FILE and/or ☐ HEARING IS CONFIDENTIAL (Specify applicable statute): _____

NAME OF INDIVIDUAL SENDING REQUEST FORM: _____ PHONE NO.: _____ FAX NO.: _____

PARTIES AND REPRESENTATIVES

PARTY REPRESENTED BY: ☐ SELF ☐ ATTORNEY	PARTY REPRESENTED BY: ☐ SELF ☐ ATTORNEY
☐ OTHER, If so, relationship: _____	☐ OTHER, If so, relationship: _____
REPRESENTATIVE'S NAME: _____	REPRESENTATIVE'S NAME: _____
PARTY'S NAME: _____	PARTY'S NAME: _____
ADDRESS: _____	ADDRESS: _____
PHONE No.: _____ (Direct Phone Number Please)	PHONE No.: _____ (Direct Phone Number Please)
FAX No.: _____	FAX No.: _____

PLEASE LIST ADDITIONAL PARTIES AND/OR REPRESENTATIVES ON EXTRA FORM PROVIDED.

SEND TO: STATE OFFICE OF ADMINISTRATIVE HEARINGS
ATTN.: Deputy Clerk
William P. Clements Building
300 West 15th Street, Suite 504
Austin, Texas 78701

OR

Post Office Box 13025
Austin, Texas 78711-3025
Docket Phone No. (512) 475-3445
Fax No. (512) 475-4994

*PLEASE FORWARD A COPY OF THE APPLICATION, APPEAL, OR COMPLAINT WITH THIS REQUEST FORM, AS WELL AS ANY OTHER PLEADING FILED IN THE CASE TO DATE IF REQUESTING *ASSIGNMENT OF ALJ or ALTERNATIVE DISPUTE RESOLUTION (ADR)/MEDIATION*. A COPY OF THE NOTICE OF PROCEEDING MUST BE FORWARDED TO SOAH AT THE SAME TIME IT IS MAILED TO THE PARTIES.

**Referring agency can only request one type of action on the Request to Docket Case form at the time of submission to SOAH. Agency(s) can only choose one of the following: Setting of Hearing or Assignment of ALJ or Alternative Dispute Resolution (ADR)/Mediation.

Figure 16: Request to Docket Case (continued)

NAME/STYLE OF THE CASE: _____ AGENCY'S FILE/CASE No., if any: _____

PLEASE ATTACH THIS FORM TO REQUEST IF ADDITIONAL PARTY AND/OR REPRESENTATIVES ARE NAMED.

PARTY REPRESENTED BY: ☐ SELF ☐ ATTORNEY ☐ OTHER, If so, relationship: _____ REPRESENTATIVE'S NAME: _____ PARTY'S NAME: _____ ADDRESS: _____ _____ _____ PHONE No.: _____ (Direct Phone Number Please) FAX No.: _____	PARTY REPRESENTED BY: ☐ SELF ☐ ATTORNEY ☐ OTHER, If so, relationship: _____ REPRESENTATIVE'S NAME: _____ PARTY'S NAME: _____ ADDRESS: _____ _____ _____ PHONE No.: _____ (Direct Phone Number Please) FAX No.: _____
PARTY REPRESENTED BY: ☐ SELF ☐ ATTORNEY ☐ OTHER, If so, relationship: _____ REPRESENTATIVE'S NAME: _____ PARTY'S NAME: _____ ADDRESS: _____ _____ _____ PHONE No.: _____ (Direct Phone Number Please) FAX No.: _____	PARTY REPRESENTED BY: ☐ SELF ☐ ATTORNEY ☐ OTHER, If so, relationship: _____ REPRESENTATIVE'S NAME: _____ PARTY'S NAME: _____ ADDRESS: _____ _____ _____ PHONE No.: _____ (Direct Phone Number Please) FAX No.: _____
PARTY REPRESENTED BY: ☐ SELF ☐ ATTORNEY ☐ OTHER, If so, relationship: _____ REPRESENTATIVE'S NAME: _____ PARTY'S NAME: _____ ADDRESS: _____ _____ _____ PHONE No.: _____ (Direct Phone Number Please) FAX No.:	PARTY REPRESENTED BY: ☐ SELF ☐ ATTORNEY ☐ OTHER, If so, relationship: _____ REPRESENTATIVE'S NAME: _____ PARTY'S NAME: _____ ADDRESS: _____ _____ _____ PHONE No.: _____ (Direct Phone Number Please) FAX No.:

Figure 17: Commission for Deposition

THE STATE OF TEXAS

TO: [COURT REPORTER]
[ADDRESS]

[NAME OF PARTY REQUESTING DEPOSITION], a party in [STYLE AND CAPTION OF DOCKET], Docket No. _____, has filed a written request for the issuance of a commission to take the deposition of [DEPONENT], [ADDRESS], to appear at [ADDRESS] on the _____ day of _____, 200__, at ____:____ a.m./p.m., then and there to be deposed before [COURT REPORTER], who shall take [DEPONENT]'s answers under oath to the oral questions which are addressed to him/her, and shall cause the written deposition, with all exhibits, to be returned to [AGENCY]. [DEPONENT] shall be deposed with respect to a certain contested case now pending before [AGENCY], styled [STYLE AND CAPTION OF DOCKET], Docket No. _____. You are authorized to require [DEPONENT] and by this Commission he/she is required to remain in attendance from day to day until the deposition is completed.

Issued this _____day of _____, 200__, Austin, Travis County, Texas, under authority of Tex. Gov't. Code Ann. ch. 2001.

_____
[EXECUTIVE DIRECTOR]
Executive Director
[AGENCY]

Figure 18: Affidavit of Records Custodian

[AGENCY]	§	STATE OF TEXAS
v.	§	
[LICENSEE]	§	COUNTY OF TRAVIS
	§	
	§	

Docket No. _____

AFFIDAVIT

BEFORE ME, the undersigned notary public, on this day personally appeared [AFFIANT], known to me (or proved to me on the oath of _____, or through _____ (description of identity card or other document)) to be the person whose name is subscribed below and, who, being by me duly sworn, did depose as follows:

"My name is [AFFIANT]. I am over 18 years of age, of sound mind, have never been convicted of a felony and am otherwise capable of making this affidavit. I am personally acquainted with the facts stated in this affidavit.

I am the custodian of the records of [AGENCY] for the State of Texas. Attached hereto are [NUMBER] pages of records from [AGENCY]. These said [NUMBER] pages of records are kept by [AGENCY] in the regular course of business, and it was in the regular course of business of [AGENCY] for an employee or representative of [AGENCY], with knowledge of the act, event, condition, opinion, or diagnosis recorded, to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time or reasonably soon thereafter. The records attached hereto are the original or exact duplicates of the original.

_____
[AFFIANT]

Sworn to and subscribed before me, the undersigned authority, on this the _____ day of _____, 200__.

_____
Notary Public

Figure 19: Proposal for Decision

Docket No. _____

TEXAS STATE BOARD OF PLUMBING EXAMINERS	§	BEFORE THE STATE OFFICE
V.	§	OF
JOE LICENSEE, LICENSEE NO. _____	§	ADMINISTRATIVE HEARINGS

PROPOSAL FOR DECISION

PRELIMINARY MATTERS

1. Background

Mr. Joe Licensee is a licensed journeyman plumber and was the subject of a complaint filed by a consumer, Mr. Iam Irritated. The complaint stated that Iam Irritated, of Woee and Company, contracted with Joe Licensee, a journeyman plumber, directly and not with any master plumber. Further, the complaint stated that Irritated paid Licensee $10,000 to replace all of the water heaters in an apartment complex owned by Irritated and that Licensee replaced only the water heaters in the first floor units. The Enforcement Committee of the Texas State Board of Plumbing Examiners reviewed the complaint and the response of the licensee and determined that there was reason to believe a violation of the Agency's statute and rules had occurred. The matter was noticed for a formal hearing to be held at the State Office of Administrative Hearings (SOAH). At the conclusion of the hearing, the Administrative Law Judge (ALJ) issued this Proposal for Decision, which recommends that the licensee's license be revoked.

2. Procedural History

In November of 2004, a complaint was filed by Iam Irritated, of Woee and Company, regarding Joe Licensee. After the licensee responded to the complaint, the Texas State Board of Plumbing Examiners determined that the matter should be referred to SOAH for a hearing.

3. Jurisdiction and Notice

There are no contested issues of notice or jurisdiction in this proceeding. Therefore, these matters are set out in the proposed findings of fact and conclusions of law without further discussion here.

A hearing was held on February 21, 2004, before Robin Steppitoes, Administrative Law Judge with SOAH. The Enforcement Committee of the Texas State Board of Plumbing Examiners was represented by Marie Connelly, Assistant Attorney General. The licensee was represented by his attorney, Gretchen Brown. The hearing concluded on February 21, 2004.

DISCUSSION

4. Revocation Criteria

Respondent's conduct described herein constitutes grounds for disciplinary action by the Board pursuant to § 9(a) of the Plumbing License Law, which states: "The Board shall revoke or suspend a license, probate a license suspension, or reprimand a licensee for any violations of this Act or rules of the Board. A violation of this Act shall include but not be limited to: ... knowingly making a substantial misrepresentation of services to be provided or which have been provided ...." 22 TAC § 365.1(2) of the Rules defines a journeyman plumber: "journeyman plumber — a license that entitles the individual to do plumbing work only under the general supervision of master plumbers and only under contracts or agreements to perform plumbing work secured by them." 22 TAC § 367.3 states, "A company offering to do plumbing work must secure the services of at least one person holding a current master plumber's license."

5. Staff of the Texas State Board of Plumbing Examiners Presentation of Case

The Enforcement Committee of the Texas State Board of Plumbing Examiners offered the witness, Iam Irritated of Woee and Company, who testified that he contracted directly with Joe Licensee and no other party. He further testified that the contract admitted into evidence as State's Exhibit A was the contract he made with Joe Licensee and that the contract accurately reflected that Joe Licensee had agreed to replace all of the water heaters in an apartment complex Iam Irritated owned for $10,000 paid in advance. Finally, he testified that he did give Joe Licensee $10,000 cash in advance, but that Joe Licensee replaced only the water heaters in the first floor units and not in all of the units as agreed.

The Enforcement Committee of the Texas State Board of Plumbing Examiners called Joe Licensee as a witness. Joe Licensee testified that he had just been laid off from his previous employment with a master plumber at the time of the incident and that he now was again working with a master plumber. He further testified that the job for which he contracted proved to be more difficult than he anticipated and that replacing water heaters in only the first floor units was worth $10,000.

6. Joe Licensee's Presentation of Case

Licensee did not call any witnesses, but offered affidavits of other plumbers who stated that replacing the water heaters in the first floor units was worth $10,000.

7. Agency Precedent

In a previous docket, Docket No. 13247, a licensee had her licensee revoked for contracting without a master plumber and not completing a job as represented in that contract.

Figure 19: Proposal for Decision (continued)

SUMMARY AND RECOMMENDATION

The Enforcement Committee of the Texas State Board of Plumbing Examiners has met its burden to prove that Joe Licensee's conduct described herein constitutes grounds for disciplinary action pursuant to § 9(a) of the Plumbing License Law, which states: "The Board shall revoke or suspend a license, probate a license suspension, or reprimand a licensee for any violations of this Act or rules of the Board. A violation of this Act shall include but not be limited to: ... knowingly making a substantial misrepresentation of services to be provided or which have been provided ...." Testimony of Iam Irritated supports the contention that Joe Licensee was not working with a master plumber and that Joe Licensee misrepresented services to be provided. Further, testimony of Joe Licensee supports the Board's case as well, despite any mitigating circumstances he believed existed. For these reasons, the ALJ recommends that the license of Joe Licensee be revoked.

FINDINGS OF FACT

1. Joe Licensee is a licensed journeyman plumber licensed by the Texas State Board of Plumbing Examiners to practice plumbing in the State of Texas and is therefore subject to the jurisdiction of that agency.

2. In November of 2003, a complaint was filed at the Texas State Board of Plumbing Examiners regarding Joe Licensee alleging that the licensee had contracted without securing the services of a master plumber and that he had substantially misrepresented services that were to be or were provided in that contract.

3. The Investigator of the Texas State Board of Plumbing Examiners, by letter dated December 20, 2003, notified the licensee of the complaint and offered the licensee an opportunity to show compliance with the applicable law and Board rules.

4. Notice of this Formal Hearing was given by letter dated January 20, 2004. Licensee received the Notice of Hearing.

5. Iam Irritated contracted solely with Joe Licensee who was not working with a master plumber.

6. Irritated and Licensee's contract required replacement of all water heaters by License in an entire apartment complex for the sum of $10,000.

7. Licensee accepted the $10,000 in advance but failed to complete the job.

CONCLUSIONS OF LAW

1. The Texas State Board of Plumbing Examiners has jurisdiction over this matter pursuant to TEX. REV. CIV. STAT. ANN. art. 6243-101 (Vernon 1996).

2. SOAH has jurisdiction over all matters relating to the conduct of a hearing in this matter, including the preparation of a proposal for decision with findings of fact and conclusions of law.

3. Joe Licensee having voluntarily received a license to practice plumbing from the Texas State Board of Plumbing Examiners, is bound to follow the provisions of TEX. REV. CIV. STAT. ANN. art. 6243-101 (Vernon 1996) and the Rules of the Board.

4. Section 9(a) of the Plumbing License Law states: "The Board shall revoke or suspend a license, probate a license suspension, or reprimand a licensee for any violations of this Act or rules of the Board. A violation of this Act shall include but not be limited to: ... knowingly making a substantial misrepresentation of services to be provided or which have been provided ...."

5. 22 TAC § 365.1(2) of the Rules defines a journeyman plumber: "journeyman plumber — a license that entitles the individual to do plumbing work only under the general supervision of master plumbers and only under contracts or agreements to perform plumbing work secured by them."

6. 22 TAC § 367.3 of the rules states, "A company offering to do plumbing work must secure the services of at least one person holding a current master plumber's license."

7. Joe Licensee violated § 9(a) of the Plumbing License Law, 22 TAC § 365.1(2) and 22 TAC § 367.3 of the Board Rules by contracting for plumbing services without a master plumber and by failing to provide services as represented in a contract.

Signed on the _____ day of _____, 200_.

_____
Robin Steppitoes
Administrative Law Judge
State Office of Administrative Hearings

Figure 20: Final Order

[AGENCY]	§	
v.	§	Docket No. _____
[LICENSEE]	§	

FINAL ORDER

Came on for consideration this _____ day of _____, 200__, the above-styled case.

After proper notice was given, the above-styled case was heard by an Administrative Law Judge who made and filed a proposal for decision containing findings of fact and conclusions of law. This proposal for decision was properly served on all parties, who were given an opportunity to file exceptions and replies as part of the administrative record.

[AGENCY], after review and due consideration of the proposal for decision, attached as Exhibit A, adopts the findings of fact and conclusions of law of the Administrative Law Judge contained in the proposal for decision and incorporates those findings of fact and conclusions of law into this Final Order as if such were fully set out and separately stated in this Final Order. All proposed findings of fact and conclusions of law submitted by any party that are not specifically adopted in this Final Order are denied.

IT IS, THEREFORE, ORDERED by [AGENCY] that the license of [LICENSEE] to practice [PROFESSION] is revoked, effective [the date of this order / OTHER DATE SPECIFIED BY THE AGENCY].

[IF SUSPENSION IS ORDERED, INCLUDE: This order remains in full force and effect until Respondent fulfills all of its terms and conditions, including completion of the suspension, regardless of the date on which the suspension is begun.]

If enforcement of this order is restrained or enjoined by an order of a court, this order shall then become effective upon a final determination by said court or appellate court in favor of the [AGENCY].

DATE ISSUED: _____

[AGENCY]:

_____

_____

_____

_____

Figure 21: Receipt of Motion for Rehearing

[DATE]

[NAME]
[ADDRESS]

Re: Case # _____

Dear [NAME]:

This letter will acknowledge receipt of your Motion for Rehearing of the Board's order entered on [DATE]. The motion was received in our office on [DATE] and is deemed timely.

If the agency chooses to grant your Motion for Rehearing, it must do so within 45 days after the Final Order was signed [or other date specific to an agency's enabling legislation].

If you have any questions regarding this matter, please contact me.

Sincerely,

Board Contact

BC:nc
CM-RRR

Figure 22: Board Action on Motion for Rehearing

[DATE]

[NAME]
[ADDRESS]

Re: Case #_____

Dear [NAME]:

Your request for a rehearing of the Board's order entered on [DATE OF BOARD ORDER] was received on [DATE].

[CHOOSE A, B, OR C:]

(A) Pursuant to the Administrative Procedure Act, your Motion for Rehearing was overruled by operation of law. The Board took no action on your Motion for Rehearing within 45 days from the date the Final Order was entered.

(B) The Board denied your Motion for Rehearing on [DATE].

(C) The Board granted your Motion for Rehearing on [DATE].

If you have any further concerns, please contact your legal counsel.

Sincerely,

Board Contact

BC:nc
CM-RRR

Figure 23: Affidavit Certifying Administrative Record

[AGENCY]	§	STATE OF TEXAS
	§	
v.	§	COUNTY OF TRAVIS
	§	
[LICENSEE]	§	Docket No. _____

AFFIDAVIT

BEFORE ME, the undersigned notary public, on this day personally appeared [AFFIANT], known to me (or proved to me on the oath of _____, or through _____ (description of identity card or other document)) to be the person whose name is subscribed below and, who, being by me duly sworn, did depose as follows:

"My name is [AFFIANT]. I am over 18 years of age, of sound mind and capable of making this Affidavit, and I am personally acquainted with the facts herein stated.

I am the Executive Director of [AGENCY] for the State of Texas, and as such, I am the Custodian of Records of [AGENCY].

I hereby certify that the attached is a true and correct copy of the administrative record made before [AGENCY] in the matter styled [AGENCY V. LICENSEE], the same appears of record in my office, and further, I am the lawfully appointed possessor and custodian of the administrative hearing record in this matter.

IN WITNESS WHEREOF, I subscribe my name, and affix the seal of [AGENCY] for the State of Texas, at my office in the City of Austin, Texas, on this the _____ day of _____, 20___."

_____
[EXECUTIVE DIRECTOR]
Executive Director
[AGENCY]

Sworn to and subscribed before me, the undersigned authority, on this the _____ day of _____, 20___.

_____
Notary Public

Judicial Enforcement Remedies:

Responding to Violations of Agency Statutes, Rules and Orders

What if, after an agency renders a final order affecting a person, the person refuses to comply with the final order? What if an agency revokes a license, but the licensee continues to practice the profession? In these instances, the agency may seek further administrative or judicial remedies to enforce its final orders.

An agency's enabling statute often provides specific requirements for enforcement proceedings. The enabling statute may specify that enforcement of the enabling statute be through the Attorney General or, alternatively, through the county or district attorney.

Legal Basis for Enforcement Actions by the Attorney General

In addition to specific authority granted in any particular agency's enabling legislation, the Attorney General is authorized to bring enforcement actions under both the APA and the Texas Constitution. Under the APA, the Attorney General may bring an action in district court upon the request of the agency whose orders or rules are to be enforced.

> **The Attorney General, on the request of a state agency to which it appears that a person is violating, about to violate, or failing or refusing to comply with a final order or decision or an agency rule, may bring an action in a district court authorized to exercise judicial review of the final order or decision or the rule to:**
>
> **(1) enjoin or restrain the continuation or commencement of the violation; or**
>
> **(2) compel compliance with the final order or decision or the rule.**[108]

Frequently, before a lawsuit is filed, the agency or the Attorney General will send the offending party a Cease and Desist Order. **[See Figure 24: Cease and Desist Order.]** The purpose of the Cease and Desist Order is to obtain voluntary compliance with the law and to formally advise the individual that further legal action will be taken by the agency unless the individual complies with the agency's order or rules.

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[108] TEX. GOV'T. CODE ANN. § 2001.202(a).

If the individual continues to violate the agency statute or rules, the agency may seek an injunction to permanently enjoin the action. Injunctions authorized by statute will be granted so long as the agency shows that a statute is being violated.[109]

Figure 24: Cease and Desist Order

IN RE:	§	BEFORE THE
	§	
[NAME]	§	[AGENCY]

CEASE AND DESIST ORDER

TO: [NAME]
[ADDRESS]

You are not currently licensed in the State of Texas as a [LICENSED PROFESSIONAL] and never have been licensed by the [AGENCY].

Therefore, you must immediately cease and desist from acting as and impersonating a [LICENSED PROFESSIONAL]. Should you fail to immediately comply with this Cease and Desist Order, you are hereby notified that [AGENCY], through the Office of the Attorney General of the State of Texas, will seek a District Court injunction against you pursuant to [AGENCY ENABLING STATUTE].

Signed this _____ day of _____, 200__.

By:
_____
[AGENCY CONTACT]

SWORN TO AND SUBSCRIBED before me, the undersigned authority, on this the _____ day of _____, 200__.

_____
Notary Public

[109] *State of Texas v. Texas Pet Foods, Inc.*, 591 S.W.2d 800, 804 (Tex. 1979); *Gulf Holding Corp. v. Brazoria County*, 497 S.W.2d 614, 619 (Tex.Civ.App.—Houston [14th Dist.] 1973, writ ref'd n.r.e.); *Priest v. Texas Animal Health Comm'n*, 780 S.W.2d 874, 876 (Tex.App.—Dallas 1989, no writ).

Rulemaking:

Overview

The APA defines a rule as: "a state agency statement of general applicability that: (i) implements, interprets, or prescribes law or policy; or (ii) describes the procedure or practice requirements of a state agency."[110] The definition specifically excludes statements governing purely internal agency management or organization. In recent years, there has been some controversy about whether certain agency statements are rules as defined by the APA. One agency was temporarily enjoined from enforcing a supervisor's inter-office memo directed to agency staff, based on the plaintiff's theory that the memo was a rule and not adopted in compliance with the APA. [111] The merits of the ruling were not reached in that particular court case. Courts in other cases have generally refused to consider agency statements "rules" if they were not adopted under the APA's rulemaking procedures.

The following are examples of agency statements that the courts have decided are not rules under the APA: an agency's resolution urging the Legislature to further define the private and parochial school exemption to the compulsory attendance law;[112] advisory letters to members of the regulated community about whether electronic machines were illegal gambling devices;[113] an agency decision in a contested case;[114] certain policies contained in agency bulletins or advisory letters;[115] and manuals or booklets prepared by the Attorney General that contained his legal determinations related to eight-liners.[116] These decisions reflect an interpretation of the APA's definition of a "rule" to require, in the first instance, that an agency actually follow the APA rulemaking procedures in issuing a particular statement before the statement would be considered a rule. However, the Texas Supreme Court recently ruled that an agency's interpretation of one of its rules to be a rule that should have been adopted through the APA process. The Court held the agency's interpretation invalid.[117] State agencies should continue to consult with legal counsel and carefully review whether their statements and other actions might trigger the APA rulemaking requirements.

In this handbook the word "rule" refers to amendments or repeals of existing rules as well as to new rules. Similarly, the word "rulemaking" refers to the process by which new rules or amendments to rules are proposed and adopted in accordance with APA procedures.

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110 TEX. GOV'T CODE ANN. § 2001.003.

111 *Texas Alcoholic Beverage Comm'n v. Amusement and Music Operators of Texas*, 997 S.W.2d 651 (Tex.App.–Austin 1999, pet. dism'd w.o.j.).

112 *Texas Education Agency v. Leeper*, 893 S.W.2d 432, 442-43 (Tex. 1995).

113 *Brinkley v. Texas Lottery Comm'n*, 986 S.W.2d 764 (Tex.App.—Austin 1999, no pet.)

114 *Railroad Comm'n of Tex. v. WBD Oil & Gas Co.*, 104 S.W.3d 69 (Tex. 2003)

115 *Beacon Nat'l Ins. Co. v. Montemayor*, 86 S.W.3d 260, 268 (Tex.App.—Austin, 2002, no pet.)

116 *Veteran's of Foreign Wars v. Abbott*, No. 03-02-00447-CV, 2003 WL 21705376 (Tex.App.—Austin 2003, no pet. h.)

117 El Paso hosp. Dist. V. Texas Health & Human servs. Comm'n,—S.W.3d—2007 WL 2457848 (Tex. 2007)

Sources of Rules

Agencies are required to adopt rules of practice setting forth the nature and requirements of all available formal and informal procedures.[118] For example, a licensing agency should adopt rules regarding the procedural steps an applicant must follow in applying for licensure.

Additionally, some enabling statutes require agencies to promulgate rules on specific aspects of their regulatory responsibilities. Some general statutes require that agencies adopt rules on specific issues. To illustrate, all agencies with advisory committees are required to adopt rules relating to those committees.[119] Other enabling statutes simply authorize an agency to enact rules as necessary to accomplish the agency's statutory duties.

New legislation may also be the source of a new rule. The APA authorizes a state agency to prepare for the implementation of legislation that has become law but has not yet taken effect by adopting rules or taking other administrative action necessary, if the agency would have been authorized to take action had the legislation been in effect at the time of the action. The rules may not take effect earlier than the legislation being implemented takes effect, however, and the rules may not result in enforcement of the legislation or rule before the legislation takes effect.[120]

All state agencies must review and consider for re-adoption all rules not later than the fourth anniversary date of their effective date and every four years thereafter. The review must include an assessment of whether the reasons for initially adopting the rule continue to exist.[121] As part of rule review, an agency will determine whether a new rule is needed or if an existing rule is no longer necessary and should be repealed.

The APA authorizes agencies to appoint committees of experts or interested persons or representatives of the general public to advise them with respect to contemplated rulemaking.[122] The APA does not specify how an agency should proceed in appointing members or how these committees should operate. The APA provides that these committees merely have advisory powers. Nevertheless, these committees may assist in drafting rules in addition to providing input on rules throughout the proposal and adoption process.

Any "interested person" may petition an agency requesting the adoption of a rule.[123] The definition of "person" includes "an individual, partnership, corporation, association, governmental subdivision, or public or private organization that is not a state agency."[124] If an agency receives a petition requesting rulemaking, the APA requires the agency within 60 days to either deny the petition in writing, stating the reasons for denial, or initiate a rulemaking proceeding.[125]

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[118] TEX. GOV'T CODE ANN. § 2001.004.

[119] TEX. GOV'T CODE ANN. § 2110.005.

[120] TEX. GOV'T CODE ANN. § 2001.006.

[121] TEX. GOV'T CODE ANN. § 2001.039.

[122] TEX. GOV'T CODE ANN. § 2001.031.

[123] TEX. GOV'T CODE ANN. § 2001.021.

[124] TEX. GOV'T CODE ANN. § 2001.003.

[125] TEX. GOV'T CODE ANN. § 2001.021.

Negotiated Rulemaking

The area of negotiated rulemaking is relatively new in a state agency context. Negotiated rulemaking has been defined in several different ways including:

> **A process by which representatives of an agency and of the interests affected by the subject of rulemaking seek to reach consensus on the terms of a proposed rule and on the process by which it is negotiated.**[126]

In 1997, the 75th Legislature enacted the Governmental Dispute Rulemaking Act to further encourage negotiated rulemaking. This Act delineates procedures which a state agency, including the Attorney General, SOAH and certain institutions of higher education, must follow during negotiated rulemaking.[127] The Act requires the appointment of a "convenor" to assist the agency in its determination of whether or not to proceed with negotiated rulemaking.[128] The "convenor" must follow specific guidelines set out in the Act.[129]

Upon deciding to proceed with negotiated rulemaking, an agency is required to publish a "notice of intent" both in the *Texas Register* (*Register)* and "in appropriate media."[130] The notice of intent must include:

> **1. a statement that the agency intends to engage in negotiated rulemaking;**
>
> **2. a description of the subject and scope of the rule to be developed;**
>
> **3. a description of the known issues to be considered in developing the rule;**
>
> **4. a list of the interests likely to be affected by the proposed rule;**
>
> **5. a list of the individuals the agency proposes to appoint to the negotiated rulemaking committee to represent the agency and affected interests;**
>
> **6. a request for comments on the proposal to engage in negotiated rulemaking and on the proposed membership of the negotiated rulemaking committee; and**
>
> **7. a description of the procedure through which a person who will be significantly affected by the proposed rule may, before the agency establishes the negotiated rulemaking committee, apply to the agency for membership on the committee or nominate another to represent the person's interests on the committee.**[131]

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[126] *A Guide to Negotiated Rule Making and Pilot Rule Making*, Washington State Office of Financial Management, Revised February 15, 1996.

[127] TEX. GOV'T CODE ANN. § 2008.002.

[128] TEX. GOV'T CODE ANN. § 2008.052.

[129] TEX. GOV'T CODE ANN. § 2008.052.

[130] TEX. GOV'T CODE ANN. § 2008.053.

[131] TEX. GOV'T CODE ANN. § 2008.053(a).

The agency is required to consider the comments received and appoint a Negotiated Rulemaking Committee to serve until the proposed rule is adopted.[132] Similarly, the agency is required to appoint a Negotiated Rulemaking Facilitator under the criteria found in the Act.[133] The Facilitator utilizes alternative dispute resolution skills to attempt to arrive at a consensus on a proposed rule.[134] If consensus is reached, the Negotiated Rulemaking Committee sends a written report to the agency that contains the text of the proposed rule. If partial consensus is reached, the written report shall name the unresolved issues and include any other information or recommendations of the Committee.[135] If the agency intends to proceed with rulemaking after the Negotiated Rulemaking Committee's report, the agency is required, within its notice of a proposed rulemaking, to state its intention, the fact that it used negotiated rulemaking, the fact that the Negotiated Rulemaking Committee Report is public information, and the report's location.[136] Finally, the rule must be proposed under the regular APA procedures.[137]

Texas Register and Texas Administrative Code

The *Register* is an official publication of the State of Texas, published by the Texas Register Division of the Office of the Secretary of State. The *Register* reflects the State's public policy "to provide adequate and proper public notice of proposed state agency rules and state agency actions . . . ."[138] It is published weekly on Fridays and contains notices of proposed rules, withdrawn rules and adopted rules. Other items published in the *Register* include open meeting notices, summaries of requests for Attorney General opinions and Texas Ethics Commission opinions, opinions of these agencies, executive orders and appointments, and other information of general interest to the public, including requests for proposals, federal legislation or regulations affecting the State or state agencies, and agency organizational or personnel changes.[139]

The *Texas Administrative Code* (*TAC*), published by the Secretary of State,[140] contains all agency rules, other than emergency rules.[141] Rules published in the *TAC* are to be officially noticed and are prima facie evidence of the text of the rules and of the fact that they are in effect.[142] The TAC as published on the Secretary of State Web site is current each day. Consult the Texas Register for pending and emergency rules.

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132 TEX. GOV'T CODE ANN. § 2008.054.

133 TEX. GOV'T CODE ANN. § 2008.055.

134 TEX. GOV'T CODE ANN. § 2008.056(a)(2).

135 TEX. GOV'T CODE ANN. § 2008.056(d).

136 TEX. GOV'T CODE ANN. § 2008.053(b).

137 TEX. GOV'T CODE ANN. § 2008.058.

138 TEX. GOV'T CODE ANN. § 2002.002.

139 TEX. GOV'T CODE ANN. § 2002.011.

140 The Texas Administrative Code is available on the Internet. The website address is www.sos.state.tx.us. Depending on your software, you may see a menu option labeled "Functions of the Office." Click on that option, then click on "Texas Administrative Code" option.

141 TEX. GOV'T CODE ANN. § 2002.051.

142 TEX. GOV'T CODE ANN. § 2002.054.

Public Notice of Proposed Rules

Rulemaking is formally initiated by an agency's publication in the *Register* of the agency's notice of a proposed rule. The Texas Register Section has rules and policies pertaining to the submission and formatting of documents for publication in the *Register*.[143] Agencies should access these rules and the Liaison Center from the Texas Register Web site http://www.sos.state.tx.us to ensure compliance with submission procedures.[144] An agency must designate at least one individual to act as liaison between that agency and the staff of the Texas Register Section.[145]

The notice of a proposed rule must be published a minimum of 30 days in advance of the intended adoption date of the rule.[146] The notice requirement in the APA gives the public advance notice of rulemaking proceedings and of the contents of proposed rules so that interested persons may decide whether they wish to comment on the proposal.

Although the agency is responsible only for filing the notice of a proposed rule with the Texas Register Section of the Office of the Secretary of State,[147] the APA specifically provides that notice of a proposed rule is not effective until published in the *Register*.[148] It is, therefore, a wise practice for the agency to confirm publication in the *Register* before moving on to subsequent steps of the rulemaking proceeding.

Certain individual notices of proposed rules are required. Agencies must mail notice of a proposed rule to all persons who have made timely written request for advance notice of its rulemaking proceedings.[149] When an agency files a notice of a proposed rule with the Texas Register Section, copies must be delivered to the Lieutenant Governor and to the Speaker of the House.[150] Additionally, the Commission on Jail Standards and the Commission on Law Enforcement Officer Standards and Education must provide law enforcement agencies with notice of the adoption of rules that affect those agencies before their rules are effective.[151]

Finally, it should be noted that before an agency even submits a proposed rule to the Texas Register Section, the agency must determine whether the rule will have an impact on local economies.[152] If such a possibility exists, the agency must prepare a local employment impact statement.[153]

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143 1 TEX. ADMIN. CODE §91.1 *et seq.*

144 The *Texas Register Liaison Center* is available by password to designated agency liaisons. Texas Register Section of the Office of the Secretary of State.

145 TEX. GOV'T CODE ANN. § 2002.021.

146 TEX. GOV'T CODE ANN. § 2001.023.

147 TEX. GOV'T CODE ANN. § 2001.023(b).

148 TEX. GOV'T CODE ANN. § 2001.025.

149 TEX. GOV'T CODE ANN. § 2001.026.

150 TEX. GOV'T CODE ANN. § 2001.032.

151 TEX. GOV'T CODE ANN. § 2001.028.

152 TEX. GOV'T CODE ANN. § 2001.022.

153 TEX. GOV'T CODE ANN. § 2001.022(a).

Contents of the Notice of Proposed Rule

The APA provides a detailed list of information that must appear in the notice of a proposed rule.[154] Further, certain major environmental rules require a regulatory analysis and a draft impact analysis for the rules to be valid.[155] In drafting the notice of a proposed rule, an agency should refer to the list of required components. When in doubt about the sufficiency of a notice for a proposed rule, an agency should consult its attorney.

The notice of a proposed rule must contain the following eight elements:

1. **a brief explanation of the proposed rule;**
2. **the text of the proposed rule;**
3. **a statement of statutory authority for the proposed rule and the statutory provision affected by the proposed rule;**
4. **a fiscal note for each year of the first five years that the rule will be in effect;**
5. **a note about public benefits and costs for each year of the first five years that the rule will be in effect;**
6. **the local employment impact statement, if required;**
7. **a request for comments on the proposed rule; and**
8. **any other statement required by law.**[156]

Agencies should provide an explanation of the proposed rule that is sufficient to apprise the public of the rule's purpose. Although not required in the proposal, agencies may include, as part of the brief explanation of the rule, a statement of the rule's factual basis or reasons for the rule. This information is beneficial in the proposal because it assists the board in considering all aspects of a rule as early as possible and provides the public with an analysis of the proposed rule's underpinnings. Furthermore, an analysis of a rule's factual basis in the proposal preamble facilitates the development of the rule's reasoned justification discussed below. The required statement of authority is a concise explanation of the particular statutory provision of law that authorizes the agency to adopt the rule. The agency must also identify that portion of its enabling statute or other provision of law that the proposed rule is intended to implement. In addition, there must be a certification that the proposed rule has been reviewed by legal counsel and found to be within the agency's statutory authority.[157]

The required fiscal note must show the name and title of the officer or employee responsible for preparing or approving it. It must state, for each year for the first five years that the rule will be in effect, the costs or reduction in costs and the increase or decrease in revenues to state and local

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[154] TEX. GOV'T CODE ANN. § 2001.024.

[155] TEX. GOV'T CODE ANN. § 2001.0225.

[156] TEX. GOV'T CODE ANN. § 2001.024(a).

[157] TEX. GOV'T CODE ANN. § 2001.024(a)(3)(C).

governments. If applicable, the fiscal note may simply state that enforcing or administering the rule has no foreseeable economic implications relating to costs or revenues of the state or local governments.[158] The *Texas Register Liaison Center checklists* gives suggested wording of the opening sentence to be included, both for rules that do and do not have fiscal implications.

The public benefit-cost note must state the name and title of the officer or employee responsible for preparing or approving the note and must show, for each of the first five years that the rule will be in effect, (1) the public benefits to be expected as a result of the rule and (2) the anticipated economic cost to persons who are required to comply with the rule.[159] The Texas Register Section will reject proposals that do not address the fiscal implications of a rule. Worse yet, failure to engage in the required analysis may result in a reviewing court's concluding that the rule was not adopted in substantial compliance with the APA, section 2001.024.[160]

The APA also requires, in the notice of proposed rules, "any other statement required by law."[161] An agency's enabling statute may require the inclusion of specific information. Various federal statutes or regulations may also require including other information in the notice of a proposed rule. The Third Court of Appeals has held that Government Code, section 2006.002, requires agencies to conduct an analysis in a proposed rule's preamble to determine whether the rule will have an adverse economic effect on small businesses.[162] The current section 2006.002 requires agencies to determine if a rule will have an adverse economic effect on small businesses and micro-businesses. If a rule may have an adverse economic effect on these businesses, an agency must prepare and include in the proposed rule an economic impact statement, as described in the provision, and a regulatory flexibility analysis, that includes alternative methods of achieving the purpose of the rule to lessen the effect on small or micro-businesses. A copy of the proposed rule that is submitted to the *Texas Register* must also be provided to the Senate and House standing committees that are charged with reviewing the proposed rule. Interim guidelines are available to assist state agencies with this requirement. They may be found on the OAG website.[163] Additionally, if an agency is considering a rule that will have an adverse economic impact on small businesses or micro-businesses (defined as entities formed to make a profit, that are independently owned and operated, and that have no more than 20 employees), the agency must take certain steps to reduce the adverse effect, if doing so is legal and feasible considering the purpose of the statute under which the rule is to be adopted.[164]

The notice of the proposed rule must include a request for comments.[165] The request for public comment on the proposed rule from any interested person must state the name, address, and telephone number of the contact person to whom comments may be submitted. The Texas Register Section recommends stating the request as follows: "Comments may be submitted to [name, title, and address of contact person]." It is becoming common practice to include the fax number or e-mail

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158 TEX. GOV'T CODE ANN. § 2001.024(a)(5).

159 *Unified Loans, Inc. v. Pettijohn*, 955 S.W.2d 649, 654 (Tex. App.–Austin, 1997, no writ).

160 TEX. GOV'T CODE ANN. § 2001.024(a)(8).

161 *Unified Loans, Inc. v. Pettijohn,* 955 S.W.2d at 654.

162 Tex. Gov't Code Ann. § 2006.002.

163 http://www.oag.state.tx.us/notice/hb3430_smbizimpact_guidelines.pdf

164 TEX. GOV'T CODE ANN. § 2006.002(a).

165 TEX. GOV'T CODE ANN. § 2001.024(a)(7).

address of the contact person. The agency may also want to include in the notice a time limit of no less than 30 days for the public to comment. This limitation will assist the agency to avoid the necessity of addressing last minute comments in the preamble of the final order adopting the rule.

When amending any part of an existing rule, the text of the entire part of the rule being amended must be set out, the deleted language must be bracketed and stricken through, and new language must be underlined. If a proposed rule is new or if it adds a complete section to an existing rule, the new language must be underlined.[166] **[See Figure 25: Sample Preamble and Proposed Rule.]**

Filing the Notice

The *Texas Register* requires all agency submissions, including rulemakings, to be submitted in electronic format. If an agency files in paper format, publication may be delayed.[167] As mentioned before, notice of a proposed rule is effective when published in the *Register*, not when filed with the Texas Register Section.[168]

Once the rule is published in the *Register*, an agency should carefully proof the text for publishing errors. If errors are found, the agency should immediately notify the Texas Register Section in writing of the error and ask for correction. The *Register* will not accept corrections that conflict with the text on file with the Secretary of State after the effective date of a rule.[169] In the event of a conflict, the official version of a rule is the text on file with the Secretary of State, not the text published in the *Register*.[170]

Comments on Proposed Rules

Agencies must provide all interested persons a reasonable opportunity to submit data, views, or arguments relating to a proposed rule.[171] The public is entitled to have at least 30 days' notice of a proposed rule before the agency adopts the rule. Generally, the public comment period begins immediately after the proposed rule is published in the *Register* and continues for at least 30 days. The comments may be oral or submitted in writing.

A public hearing may be held on a proposed rule and must be provided if requested by a governmental subdivision or agency, by 25 or more persons, or by an association with at least 25 members.[172] Occasionally an agency may choose to hold multiple public hearings. For example, if there is substantial public comment from a particular region of the state, the agency may convene a hearing in that area, as well as in Austin. It is within the agency's discretion to determine the type, number, duration, and location of public hearings. **[See Figure 26: Agenda for the Public Hearing on a Proposed Rule.]**

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166 TEX. GOV'T CODE ANN. § 2001.024(b).

167 TEX. GOV'T CODE ANN. § 2002.016.

168 TEX. GOV'T CODE ANN. § 2001.025; 1TEX. ADMIN. CODE § 91.61.

169 1TEX. ADMIN. CODE § 91.31(d).

170 TEX. GOV'T CODE ANN. § 2001.037.

171 TEX. GOV'T CODE ANN. § 2001.029(a).

172 TEX. GOV'T. CODE ANN. § 2001.029(b).

A member of the agency staff or one or more board members conducts the public hearing. The person conducting the hearing sets the order of speakers, may ask questions to clarify the comments, may impose time limits on speakers, and may determine other procedural matters. The board members of the agency may attend the public hearing or even conduct the hearing themselves. Regardless of who conducts the hearing, the purpose of the public hearing is to give the public an opportunity to provide oral comments. The oral comments received at the public hearing are in addition to any written comments submitted to the agency.

A public hearing on a proposed rule under the APA must be distinguished from a meeting of a quorum of a board under the Open Meetings Act. A public hearing under the APA includes an opportunity to address the agency. The Open Meetings Act itself does not grant the public a right to speak at public meetings; it only establishes a right to attend and listen. If a quorum of a board chooses to conduct the public hearing on a proposed rule, since deliberations between the quorum are very likely to occur during the public hearing, the Open Meetings Act is implicated and proper notice should be posted. Whether or not required by the Open Meetings Act, publication of a notice of a hearing on a proposed rule in the *Register* and at other regular posting locations is advisable to ensure public participation.

Although not required, sometimes it may be advantageous to the public comment and hearing process for agency staff to develop formal staff comments regarding a proposed rule. These comments should be filed with the agency contact person and made available for review by the public. Staff comments do not include advice given by the agency's legal counsel, unless the board decides to waive the confidentiality of the advice and disclose it to the public.

Responding to Comments

An agency must consider fully all written and oral submissions concerning the proposed rule.[173] Frequently, agencies will revise rules in response to comments received during the rulemaking process. The question then arises whether the agency should re-propose the rule, republish it to start the rulemaking process anew, or adopt the rule with revisions to the version originally published. To some extent, the APA envisions that an agency will modify a proposed rule based on public comments; otherwise it makes little sense to give the public the opportunity for comment. Nevertheless, if an agency changes a rule in nature or scope so much that it could be deemed a different rule, if the rule as adopted would affect individuals who would not have been impacted by the rule as proposed, or if the rule as adopted imposes more stringent requirements for compliance than the proposed version, the prudent course would be to republish the rule.[174]

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[173] TEX. GOV'T. CODE ANN. § 2001.029.

[174] TEX. GOV'T CODE ANN. § 2001.035; *Texas Workers' Comp. Comm'n v. Patient Advocates of Texas,* 136 S.W.3d 643 (Tex. 2004)*; State Bd. of Ins. v. Deffebach*, 631 S.W.2d 794 (Tex.Civ.App.—Austin 1982, writ ref'd n.r.e.).

Agency Order Adopting a Rule

An agency may not adopt a proposed rule sooner than 30 days or later than six months after it is published in the *Register*.[175] A proposed rule is automatically withdrawn six months after its publication in the *Register* if the agency does not adopt or withdraw it before that time.[176]

The agency order adopting a rule must include a reasoned justification of the rule, a statement of the authority under which the rule is adopted, and a legal certification.[177] **[See Figure 27: Sample Preamble and Adopted Rule; and Figure 28: Order Adopting a Rule.]** The agency's justification must explain "how and why it reached the conclusions it did."[178] The agency must present its justification "in a relatively clear, precise, and logical fashion."[179] The justification must include:

1. **a summary of comments received from parties interested in the rule that shows the names of interested groups or associations offering comment on the rule and whether they were for or against its adoption;**

2. **a summary of the factual basis for the rule as adopted that demonstrates a rational connection between the factual basis for the rule and the rule as adopted; and**

3. **the reasons why the agency disagrees with party submissions and proposals.[180]**

The supreme court has explained that "section 2001.033 places an affirmative duty on an agency to summarize the evidence it considered, state a justification for its decision based on the evidence before it, and demonstrate that its justification is reasoned."[181] The duty to present a reasoned justification exists independently of the duty to include the foregoing three elements in the order.[182]

A state agency "shall consider fully all written and oral submissions."[183] It is in the reasoned justification of the agency's order adopting a rule that the agency should affirmatively state its agreement with comments, or if it disagrees, it must state its reasons for disagreement. The reasoned justification of the rule needs to demonstrate in a relatively clear and logical fashion that the rule is a reasonable means to a legitimate objective.[184]

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175 TEX. GOV'T CODE ANN. §§ 2001.023 and 2001.027.

176 TEX. GOV'T CODE ANN. § 2001.027.

177 TEX. GOV'T CODE ANN. § 2001.033.

178 *National Ass'n of Indep. Ins. v. Texas Dep't of Ins.*, 925 S.W.2d 667, 669 (Tex. 1996).

179 *National Ass'n of Indep. Ins. v. Texas Dep't of Ins.*, 925 S.W.2d at 669; *Railroad Comm'n v. Arco Oil & Gas Co.*, 876 S.W. 2d 473, 492 (Tex. App.–Austin 1994, writ denied).

180 TEX. GOV'T CODE ANN. § 2001.033(a)(1).

181 *National Ass'n of Indep. Ins. v. Texas Dep't of Ins.*, 925 S.W.2d at 669.

182 *Texas Nat. Res. Conser. Comm'n v. Accord Ag., Inc.,* 1999 WL 394818 (Tex. App.–Austin 1999, not designated for pub.)*; National Ass'n of Indep. Ins. v. Texas Dep't of Ins.*, 925 S.W.2d at 669; *Railroad Comm'n v. Arco Oil & Gas Co.*, 876 S.W. 2d at 491-492.

183 TEX. GOV'T CODE ANN. § 2001.029(c).

184 TEX. GOV'T CODE ANN. §2001.035(c).

The factual basis should address the underlying reasons for the rule and any data or information considered by the agency in formulating the rule. The APA requires the order adopting the rule to include a summary of the factual basis which demonstrates a rational connection between the factual basis for the rule and the rule as adopted.[185]

The order adopting the rule must also restate the rule's statutory authority and how the agency interprets that authority as authorizing or requiring the rule.[186] Finally, the order must include a statement that the rule has been "reviewed by legal counsel and found to be a valid exercise of the agency's legal authority."[187]

The order adopting the rule may be viewed as the culmination of the rulemaking process. Upon approving an order adopting a rule, the agency forwards the adopted rule for publication in the *Register*. With three exceptions, set out in the APA, the rule is effective 20 days after the date the adopted rule is filed with the Secretary of State, Texas Register Section.[188]

Internet Access to Rules

State agencies must make their rules available on the Internet. The text of each current agency rule and other materials that explain or interpret any rule must be made available on a generally accessible Internet site. The site must provide an opportunity for the public to send questions about the agency's rules to the agency electronically and for the public to receive answers to its questions electronically.[189] State agency rules are also available online through the TAC.[190]

Emergency Rules

An agency may adopt emergency rules without first publishing proposed rules, but only in the presence of an "imminent peril to the public health, safety, or welfare" or in response to a requirement of state or federal law.[191] In either case, the agency adopts the emergency rule upon finding that it is not practical to provide the usual 30 days' prior notice and hearing. Such circumstances occur infrequently. An agency must still comply with the posting requirements of the Open Meetings Act before it may adopt emergency rules.[192]

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185 TEX. GOV'T CODE ANN. § 2001.033(a)(1)(B); *See also Methodist Hosp. v. Texas Indust. Accident Bd.*, 798 S.W.2d 651, 659 (Tex.App.—Austin 1990, writ dism'd w.o.j.); *Railroad Comm'n of Texas v. Arco Oil & Gas, Co.*, 876 S.W.2d at 491 (Tex.App.—Austin 1994, writ denied); *National Ass'n of Indep. Ins. v. Texas Dep't of Ins.*, 925 S.W.2d 667 (Tex. 1996); *Texas Hosp. Ass'n v. Texas Workers' Compensation Comm'n*, 911 S.W.2d 884 (Tex.App.—Austin 1995, writ denied) (requiring a penetrating analysis of factors).

186 TEX. GOV'T CODE ANN. § 2001.033(a)(2).

187 TEX. GOV'T CODE ANN. § 2001.033(a)(3).

188 TEX. GOV'T CODE ANN. § 2001.036.

189 TEX. GOV'T CODE ANN. § 2001.006.

190 *See* Supra 131.

191 TEX. GOV'T CODE ANN. § 2001.034; *National Ass'n of Indep. Insurers v. State Bd. of Ins.*, No. 91-14131 (Travis County Dist. Ct.), *reprinted in* 1992 Texas Administrative L.J. 16, 34; Hon. F. Scott McCown, *Emergency Rulemaking*, in STATE BAR OF TEXAS PROF. DEV. PROGRAM, 8 Advanced Administrative Law Course (1993).

192 TEX. GOV'T CODE ANN. §§ 551.041 and 551.043-5.

The agency must file the emergency rule for publication in the *Register*, with a written statement explaining the reasons for the agency's action. In addition, the agency must take appropriate measures to make emergency rules known to affected persons.[193] An emergency rule is effective immediately on filing with the Texas Register Section.[194]

An emergency rule is effective for no longer than 120 days. It may be renewed once for no longer than 60 days. During this period, an identical rule may be filed and adopted according to normal rulemaking procedures prescribed by the APA.[195]

Judicial Review of Agency Rules

A declaratory judgment is available to determine the validity or applicability of any agency rules, including emergency rules.[196] A rule may be reviewed "if it is alleged that the rule or its threatened application interferes with or impairs, or threatens to interfere with or impair, a legal right or privilege of the plaintiff."[197] The action may be brought only in a Travis County district court, and the agency must be made a party. In some instances, upon motion of either party or motion by the district court in Travis County, a case may be transferred to the Third Court of Appeals for an accelerated review.[198]

Agencies must possess statutory authority to adopt rules.[199] For example, a licensing agency may not adopt a rule requiring an applicant for a license to serve a two-year apprenticeship if the agency's enabling legislation does not impose an apprenticeship requirement. Similarly, an agency may not require an applicant to pay a licensure application fee of $200 if the agency's enabling legislation caps the fee at $100. Rules that exceed the agency's statutory authority are void.[200]

An agency rule must comport with constitutional provisions and be adopted in accordance with proper APA procedures.[201] A rule is voidable if it is not adopted in substantial compliance with sections 2001.0225-2001.034 of the APA.[202] Further, a mere technical defect that does not result in prejudice to a person's rights or privileges is not grounds for invalidation of a rule.[203] In a procedural

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193 TEX. GOV'T CODE ANN. § 2001.036(b).

194 TEX. GOV'T CODE ANN. § 2001.036(a)(2).

195 TEX. GOV'T CODE ANN. § 2001.034.

196 TEX. GOV'T CODE ANN. § 2001.038.

197 TEX. GOV'T CODE ANN. § 2001.038.

198 TEX. GOV'T CODE ANN. § 2001.038(f).

199 *State Bd. of Ins. v. Deffebach*, 631 S.W.2d 794, 798 (Tex.App.—Austin 1982, writ ref'd n.r.e.); *Fulton v. Associated Indemnity Corp.*, 46 S.W.3d 364 (Tex.App.–Austin 2001, pet. denied); *see also* Op. Tex. Att'y Gen. No. GA-0234 (2004); Op. Tex. Att'y Gen. No. GA-0020 (2003).

200 *State Offfice of Pub. Util. Counsel v. Public Util. Comm'n*, 131 S.W.3d 314 (Tex.App.–Austin 2004, pet. denied)

201 *Bullock v. Hewlett-Packard Co.*, 628 S.W.2d 754, 756 (Tex. 1982); *Texas Liquor Control Bd. v. The Attic Club*, 457 S.W.2d 41, 45 (Tex. 1970).

202 TEX. GOV'T. CODE ANN. § 2001.035(a).

203 TEX. GOV'T. CODE ANN. § 2001.035(d).

challenge, the court's review is limited to the "four corners" of the order adopting the rule to determine an agency's substantial compliance with the APA.[204] An action challenging a rule for noncompliance with APA rulemaking requirements must be filed within two years of the effective date of the rule.[205]

If a court finds that an agency has not substantially complied with one or more procedural requirements of the APA, the court may remand the rule, or a portion of the rule, to the agency and, if it does remand, shall provide a reasonable time for the agency to either revise or readopt the rule through established procedure. During the remand period, the rule shall remain effective unless the court finds good cause to invalidate the rule or a portion of the rule, effective as of the date of the court's order.[206]

In a case that involves only the applicability of a rule, the plaintiff must show why a rule should not apply to the plaintiff. In essence, a plaintiff must plead facts explaining why plaintiff falls outside the reach of the rule, or why the rule was not designed to apply to plaintiff. If the agency has no intention of applying the rule to the plaintiff, the defendant's attorney should file a plea to the jurisdiction, indicating that the agency has no intent to apply the rule against the plaintiff.[207]

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204 *Texas Hosp. Ass'n v. Texas Workers' Compensation Comm'n*, 911 S.W.2d 884, 886 (Tex.App.—Austin 1995, writ denied).

205 TEX. GOV'T CODE ANN. § 2001.035(b).

206 TEX. GOV'T CODE ANN. § 2001.039.

207 *Texas Pub. Util. Comm'n v. City of Austin*, 728 S.W.2d 907, 911 (Tex.App.—Austin 1987, writ ref'd n.r.e.).

Figure 25: Sample Preamble and Proposed Rule

TITLE 25 HEALTH-SERVICES
Part 16 Texas Health Care Information Council
Chapter 1301. Health Care Information

Subchapter D. Rules and Procedures for Council Officers, Council Employees, Donors and Donations

25 TAC §§1301.51-1301.54

The Texas Health Care Information Council (Council) proposes new §§1301.51-1301.54, concerning Rules and Procedures for Council Officers, Council Employees, Donors and Donations. The Council is authorized to accept gifts of money from a private donor under the Texas Health and Safety Code, §108.006 (b)(4) and §108.015. The new sections are proposed to establish standards of conduct governing the relationship between the donor and the agency's officers and employees and to describe the procedure for the Council to follow for the acceptances of donations with a value of $500 or more.

Jim Loyd, Executive Director, has determined that for the first five-year period the new rules are in effect there will be no additional cost to state or local governments as a result of enforcing or administering the new sections.

Mr. Loyd also has determined that for each year of the first five-year period the rules are in effect the public benefit will be a reduction in general revenue expenditures by the Council. Mr. Loyd has determined that there will be no economic costs to persons who are required to comply with the new sections.

Comments on the proposed new rules may be submitted to Jim Loyd, Executive Director, Texas Health Care Information Council, Brown-Heatly Building, 4900 North Lamar OOL-3407, Austin, Texas 78751-2399 no later than 30 days from the date that these proposed rules are published in the Texas Register.

The new rules are proposed under the Texas Health and Safety Code, §108.006 (b)(4) and §108.015 and under Government Code Chapters 575 and 2255. The Council interprets §108.006 (b)(4) and §108.015 as authorizing the Council to accept gifts of money from a private donor. The Council interprets Chapter 575 as requiring the Council to adopt rules establishing procedures for the acceptance of gifts of $500 or more. The Council interprets Chapter 2255 as requiring the Council to adopt rules governing the relationship between the donor and the Council and its employees.

No other statutes, articles, or codes are affected by the proposed new rules.

§1301.51.Definitions.
The following words and terms, when used in this section, have the following meanings, unless the context clearly indicates otherwise.
(1) Council-The state agency known as the Texas Health Care Information Council.
(2) Donation-A gift of property, including money, or services to the Council.
(3) Donor-An individual, not an employee or officer of the Council, or an organization that gives or offers to give a donation to the Council.
(4) Employee-A person employed by the Council on a full-time or part-time basis, including volunteers, for purposes of this section only.
(5) Officer-The Council's executive director or the appointed members of the Council.

Figure 25: Sample Preamble and Proposed Rule (continued)

§1301.52.Administration and Investment of Funds.
Donated funds shall be deposited in the state treasury.

§1301.53.Relationships.
(a) Approved Relationships.
(1) An officer or employee may serve as an officer or director of a donor, except as set forth in subsection (b)(2) of this section.
(2) An officer or employee may receive compensation for services rendered to a donor, except as set forth in subsection (b)(3) and (4) of this section.
(b) Disapproved Relationships.
(1) No agency employee or property may be used by a donor.
(2) No officer or employee who serves as an officer or director of a donor shall vote on or otherwise participate in any measure, proposal, or decision pending before the donor if the Council might reasonably be expected to have an interest in such measure, proposal, or decision.
(3) No officer or employee shall accept employment from or engage in any business or professional activity with a donor which the officer or employee might reasonably expect would require or induce the employee or officer to disclose confidential information acquired by reason of the person's official position.
(4) No officer or employee shall accept employment or compensation from a donor which could reasonably be expected to impair the officer or employee's independence of judgment in the performance of official duties.
(5) No officer or employee shall make personal investments in association with a donor which could reasonably be expected to create a substantial conflict between the officer or employee's private interest and the interest of the Council.
(6) No officer or employee shall accept or solicit any gift, favor, or service from a donor that might reasonably tend to influence the exercise of official conduct.
(7) No officer or employee shall intentionally or knowingly solicit, accept, or agree to accept any benefit for having exercised official powers on behalf of a donor or for having performed official duties in favor of a donor.
(8) The Council shall not accept a donation from a person required to provide data under the Texas Health and Safety Code, Chapter 108, or a person who or a business entity that provides goods or services to the Council for compensation.

§1301.54.Procedure for Acceptance of Certain Gifts.
(a) Gifts of a value of $500 or more shall be accepted by a majority of the Council in an open meeting.
(b) The minutes of the meeting shall reflect the name of the donor, a description of the gift, and the purpose of the gift.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Jim Loyd
Executive Director
Texas Health Care Information Council
For further information, please call: (512) 424-6492

Figure 26: Agenda for the Public Hearing on a Proposed Rule

[AGENCY]
PUBLIC HEARING AGENDA
[DAY OF WEEK], [YEAR] AT [TIME]
[STREET ADDRESS]
[CITY], TEXAS [ZIP]

1. Call to Order

2. Public hearing to receive comments from interested persons concerning the new rule proposed under [SECTION OF AGENCY ENABLING STATUTE], which provides [AGENCY] with the authority to promulgate and adopt rules consistent with the Act governing its administration, including a rule relating to [DESCRIBE RULE]. The proposed rule, [TAC CITE], was published in the [DATE] issue of the *Texas Register*. Any interested person may appear and offer comments or statements, either orally or in writing; however, questioning of commenters will be reserved exclusively to [AGENCY] or its staff as may be necessary to ensure a complete record. While any person with pertinent comments or statements will be granted an opportunity to present them during the course of the hearing, [AGENCY] reserves the right to restrict statements in terms of time or repetitive content. Organizations, associations, or groups are encouraged to present their commonly held views or similar comments through a representative member where possible. Persons with disabilities who have special needs and who plan to attend the meeting should contact [NAME OF PERSON] of [AGENCY] at [TELEPHONE NUMBER].

3. Adjourn.

Figure 27: Sample Preamble and Adopted Rule

TITLE 25 HEALTH-SERVICES
Part 16 Texas Health Care Information Council
Chapter 1301. Health Care Information

25 TAC §§1301.11

The Texas Health Care Information Council (Council) adopts amendments to § 1301.11 relating to procedures hospitals must follow to report discharge data. The amended section is adopted with changes to the proposed text as published in the September 19, 1997, issue of the *Texas Register* (22 TexReg 9427).

The amended section is adopted, in part, to implement the requirements of Senate Bill 802 enacted by the 75th Texas Legislature. The amended section also clarifies inconsistencies in the Council's original hospital discharge data rules published in the August 12, 1997, issue of the *Texas Register* (22 TexReg 7490). Changes in the adopted amendment respond to public comments or otherwise reflect nonsubstantive variations from the proposed amendments. The Council's representative from the Office of the Attorney General has advised that the changes affect no new persons, entities, or subjects other than those given notice and that compliance with the adopted sections will be less burdensome than under the proposed sections. Accordingly, republication of the adopted sections as proposed amendments is not required.

Amended § 1301.11 amends the definition of "Rural provider."

The following entities furnished written comments on the proposed amendments: [Name the interested groups and associations.]

Hospital commented against the proposed definition, contending that the definition of rural provider is too broad and includes hospitals that should be excluded because of their size from the requirement to report data. The Council disagrees. The Council's definition of rural provider tracks the definition in Senate Bill 802. The Council lacks authority to adopt a definition that varies from the statutory definition of the term.

_____, _____, and _____ commented against the proposed definition, contending that the definition as proposed varied from the statutory definition. The Council agrees. The definition as proposed omitted several words where used in Senate Bill 802. The Council has also added language to track the statute's definition.

The amended section is adopted under Health and Safety Code, §108.006(a) and (b). The Council interprets §108.006(a) as authorizing it to adopt rules necessary to carry out Chapter 108, including rules concerning data collection requirements. The Council interprets (b) as requiring a specific definition of the term "rural provider."

§1301.11. Definitions. The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

Rural provider - A health care facility located in a county with a population of not more than 35,000 as of July 1 of the most recent year according to the most recent United States Bureau of the Census estimate; or located in a county with a population of more than 35,000 but with 100 or fewer licensed hospital beds and not located in an area that is delineated as an urbanized area by the United States Bureau of the Census; and is not state owned, or not managed or directly or indirectly owned by an individual, association, partnership, corporation, or other legal entity that owns or manages one or more other hospitals. A health care facility is not a rural provider if an individual or legal entity that manages or owns one or more hospitals owns or controls more than 50% of the voting rights with respect to the governance of the facility.

The Council hereby certifies that the section as adopted has been reviewed by legal counsel and found to be a valid exercise of the agency's authority.

Figure 28: Order Adopting a Rule

TEXAS HEALTH CARE INFORMATION COUNCIL

ORDER ADOPTING AMENDED § 1301.11

The Texas Health Care Information Council (Council) published notice of a proposed amendment to § 1301.11 of Chapter 1301 of Title 25 of the Texas Administrative Code relating to the collection and release of hospital discharge data on September 19, 1997. The proposed amendment was published in the *Texas Register* at 22 TexReg 9427.

The Council received written comments from interested entities and persons and has fully considered all comments before entering this order.

The proposed amendment as published and the preamble attached to this order are incorporated by this reference as though set forth at length herein verbatim.

IT IS HEREBY ORDERED that the proposed amended definition of "rural provider" in § 1301.11 is adopted without changes to the proposed text, except as follows: The phrase "association, partnership, corporation," is added between the words "individual," and "or," the word "other" is added between the words "or" and "legal" and the word "other " is added between the words "more" and "hospitals" in the first sentence.

The effective date is 20 days after filing notice hereof with the Secretary of State.

_____	_____
Member	Member
_____	_____
Member	Member
_____	_____
Member	Member

The Attorney General's Role:

Services Provided by the State's Legal Representative

The Texas Constitution of 1876 provides that "[t]he Attorney General ... shall represent the State in all suits and pleas in the Supreme Court of the State in which the State may be a party, ... [and] shall ... give legal advice in writing to the Governor and other executive officers, when requested by them, and perform such other duties as may be required by law ...."[208] Moreover, the Legislature has the authority "... to create additional causes of action in favor of the State and entrust their prosecution, whether in the trial or in the appellate courts, solely to the Attorney General."[209]

The assistant attorneys general assigned to represent state agencies, boards and commissions provide a variety of legal services, including:

- **defending lawsuits that challenge agency actions, rules or final orders;**
- **filing lawsuits to enforce the agency's enabling statute(s) and rules;**
- **assisting in the enforcement of the agency's enabling statute(s) through contested case proceedings at the State Office of Administrative Hearings;**
- **reviewing rules proposed by the agency; and**
- **providing general legal advice on topics such as the Open Meetings Act, Open Records Act, rulemaking, administrative law, employment law, purchasing law, contract law and ethics law.**

The Office of the Attorney General assigns the highest priority to the defense of lawsuits. Setting priorities in other areas depends, in part, on the priorities of the individual state agencies.

Personal Liability and Representation in Lawsuits

State officers and employees can be sued in two distinct capacities. First, an officer or employee may be sued in an individual capacity; in such a case, the State may indemnify the individual, or the employee may be personally liable for any adverse judgment. Second, an officer or employee may be sued in an official capacity; in such a case, the State pays any adverse judgment.[210]

When state officers or employees are sued in their official capacities, it is as though the offices they hold have been sued. They are entitled to raise any defenses that would be available to the State.[211]

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208 TEX. CONST. art IV, § 22.

209 TEX. CONST. art IV, § 22; *Maud v. Terrell*, 109 Tex. 97, 200 S.W. 375, 376 (1918); Op. Tex. Att'y Gen. No. JM-791 (1987).

210 *Russell v. Edgewood Indep. Sch. Dist.*, 406 S.W.2d 249, 251-52 (Tex.Civ.App.—San Antonio 1966, writ ref'd n.r.e.).

211 *Bagg v. University of* Texas *Medical Branch*, 726 S.W.2d 582, 586 (Tex.App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.).

The doctrine of sovereign immunity protects the State from suit and liability unless immunity is waived.[212]

The legislature has waived the State's immunity in some areas.[213] For example, state entities can be held liable to a limited extent for some tortious acts of their employees under the Texas Tort Claims Act (TTCA). Generally, the TTCA waives sovereign immunity for property damage, personal injury and death caused by an employee acting in the scope of employment if the harm arises from the operation or use of motor-driven vehicles or equipment. Additionally, under certain circumstances, the TTCA waives sovereign immunity for personal injury and death caused by a condition or use of tangible property.[214] The State's liability under this statute is limited to $250,000 per person or $500,000 per occurrence for bodily injury or death and $100,000 per occurrence for injury to or destruction of property.[215] It is important to note that although the TTCA waives sovereign immunity, it does not waive individual immunities.[216]

Similarly, the legislature waived the State's immunity from suit in the Whistleblower Act. Under the Whistleblower Act, a state agency may not suspend, fire or discriminate against a public employee who in good faith reports a violation of law to an appropriate law enforcement authority.[217] In addition, a supervisor who violates this statute is liable for a civil penalty of up to $15,000.[218] Unless the legislature has waived sovereign immunity, as it did in the TTCA and the Whistleblower Act, an employee who is sued in an official capacity may rely on sovereign immunity as a defense to liability.

It is not especially common for board members, officers or employees to be sued in their individual capacities in the context of administrative law cases. Suits seeking damages more often arise out of personnel or employment decisions. Licensed individuals and regulated entities have, however, filed suits seeking damages, alleging that procedural defects in administrative proceedings constitute violations of due process or equal protection. These claims are generally dismissed on jurisdictional grounds based on a claim of immunity.

Government employees enjoy certain protections from personal liability in lawsuits. One type of protection is the doctrine of official immunity. Government employees are entitled to immunity from suits that arise from the performance of their discretionary duties in good faith as long as they are acting within the scope of their authority.[219] Whether a particular act is covered by official immunity depends on the facts of the individual case.[220] The first element of official immunity should not be at issue in most regulatory cases, because most regulatory decisions necessarily involve the exercise of governmental discretion. The second element requires government employees to show that they

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212 *Lowe v. Texas Tech Univ.*, 540 S.W.2d 297, 298 (Tex. 1976).

213 TEX. CIV. PRAC. & REM. CODE ANN. § 101.001 *et seq.* (Texas Tort Claims Act); TEX. GOV'T CODE ANN. § 554.001 *et seq.* (Whistleblower Act).

214 TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.021 and 101.025.

215 TEX. CIV. PRAC. & REM. CODE ANN. § 101.023(a).

216 TEX. CIV. PRAC. & REM. CODE ANN. § 101.026.

217 TEX. GOV'T CODE ANN. § 554.002.

218 TEX. GOV'T CODE ANN. § 554.008.

219 *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994).

220 *Kassen v. Hatley*, 887 S.W.2d 4, 12 (Tex. 1994).

reasonably could have believed their conduct to be justified.[221] Finally, the third element requires a government employee to prove that the offending act was taken within the scope of the employee's authority.[222] Government employees who establish all three elements will be protected from personal liability by the doctrine of official immunity.

Another protection public servants enjoy is the limited right to indemnification by the state.[223] Under Chapter 104 of the Civil Practice and Remedies Code, governmental employees, board members and other public officials are entitled to this protection without regard to whether they perform their services for compensation.[224] Indemnity protection is afforded to eligible persons for acts and omissions taken in the course and scope of their service in cases that are based on constitutional, statutory and even negligence grounds, or when the Attorney General determines that it would be in the interest of the State. The only claims excepted are those based on acts taken in bad faith, conscious indifference or reckless disregard.[225] Generally, the State will indemnify eligible persons for damages awarded against them in amounts up to $100,000 each, $300,000 per occurrence involving personal injury, death, or deprivation of a right, privilege or immunity.[226] The State will also indemnify eligible persons for damages awarded against them, up to $10,000 per single occurrence of damage to property.[227] The State will not, however, indemnify persons for amounts covered by insurance, except for damages that exceed statutory indemnification limits. State agencies may buy liability insurance for their officers and executive staff to cover (1) conduct described in § 104.002 relating to negligence, civil rights violations, or hazardous waste manifests and records, or if the Attorney General otherwise approves of indemnification and (2) other conduct customarily covered under directors' and officers' liability insurance. Insurance may be bought with state funds to cover a director, officer, member of the governing board, or a member of the executive staff of the agency. The policy must be limited to providing coverage only for liability in excess of the state's liability under TEX. CIV. PRAC. & REM. CODE § 104.003. The insurance policy must have a deductible in an amount equal to the limits of state liability under § 104.003 (generally $100,000 per person, $300,000 per occurrence, and $10,000 for property damage). The deductible may be lower for an individual's liability.[228]

Public servants may be personally liable for punitive or exemplary damages awarded against them, or for damages that exceed the indemnification limits listed above. Punitive or exemplary damages must be based on a finding that the employee has acted maliciously or in bad faith. In cases based on state law, public servants who are entitled to state indemnification, or who are covered by insurance, are not liable for damages in excess of $100,000.[229] This limitation on personal liability does not apply to damages based on the U.S. Constitution or federal laws.

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221 *Lancaster*, 883 S.W.2d at 656-57.

222 *Id.* at 658.

223 TEX. CIV. PRAC. & REM. CODE ANN. §§ 104.001-104.008.

224 TEX. CIV. PRAC. & REM. CODE ANN. § 104.001.

225 TEX. CIV. PRAC. & REM. CODE ANN. § 104.002(a).

226 TEX. CIV. PRAC. & REM. CODE ANN. § 104.003(a)(1).

227 TEX. CIV. PRAC. & REM. CODE ANN. § 104.003(a)(2).

228 TEX. CIV. PRAC. & REM. CODE ANN. § 104.003(b) and § 104.009.

229 TEX. CIV. PRAC. & REM. CODE ANN. §§ 108.002(a), (b).

The Attorney General represents persons who are eligible for state indemnification.[230] When public servants are sued and want representation from the Attorney General, they must notify the Office of the Attorney General within 10 days of service.[231] The request for legal representation should include copies of the citation or summons and the petition or complaint. Persons eligible for state indemnification also have the right to be co-represented by a private attorney of their choice, at their own expense. As long as a public servant wishes to have state indemnification, the assistant attorney general assigned to the case remains the attorney in charge of the defense. State defendants who choose to retain private co-counsel should inform the Office of the Attorney General of this decision as soon as possible.

Attorney General Opinions

The Texas Constitution provides that the Attorney General shall "give legal advice in writing to the Governor and other executive officers, when requested by them."[232] An opinion is "advice or a judgment or decision and the legal reasons and principles on which it is based."[233] Requests for opinions must be in writing, and should be submitted directly to the Office of the Attorney General, Opinion Committee. A request for an Attorney General Opinion must come from the head of a state agency, certain elected officials or other statutorily authorized requestors. The Opinion Committee will provide either an informal letter opinion or a formal, published opinion. Requests about specific pending requests should be directed to the assistant attorney general assigned to represent the agency. Formal Attorney General Opinions as well as open records decisions may be accessed at the Attorney General's Web site at www.oag.state.tx.us.

Open Records Decisions

A request for an open records decision is different from a request for an Attorney General Opinion. A request for an open records decision should be directed to the Office of the Attorney General, Open Records Division. An open records decision is to be requested when an agency receives a request for documents held by the agency and claims that some or all of them are exempt from disclosure under the Public Information Act. The Open Records Division will provide either an informal letter ruling or a formal, published open records decision. This process is discussed in greater detail later in this handbook.

The Scope of Legal Services Provided

The degree to which agencies receive advice and representation from the Office of the Attorney General depends upon a variety of circumstances:

- **the availability of staff attorneys or outside counsel to the agency;**
- **the agency's need for litigation or non-litigation assistance;**

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230 TEX. CIV. PRAC. & REM. CODE ANN. § 104.004.

231 TEX. CIV. PRAC. & REM. CODE ANN. § 104.005(2).

232 TEX. CONST. art. IV § 22.

233 TEX. GOV'T CODE ANN. § 402.041.

- **the need to protect the public;**
- **the potential for subsequent litigation;**
- **the specific statutory duties of the Office of the Attorney General in addition to its general constitutional mandate; and**
- **the availability of resources within the Office of the Attorney General.**

No two agencies are exactly alike in terms of statutory authority or resources. Consequently, the role of the assistant attorney general in providing advice varies from agency to agency. Agencies with neither legal staff nor outside counsel rely primarily on the Administrative Law Division in the Office of the Attorney General for assistance with reviewing rules, conducting rulemaking hearings, prosecution of contested cases and other general counsel duties, in addition to performing general litigation duties. Although assistant attorneys general may be available to provide legal counsel to agencies, they do not act as decision-makers.

When a statute directs the Attorney General to represent two state agencies that may be in conflict in a contested case proceeding or in litigation, the Office of the Attorney General may represent both agencies.[234] When two state agencies are in conflict in legal proceedings,
different assistant attorneys general are assigned so that the legal interests of the two state agencies can be properly represented. In addition, the assistant attorneys general take whatever steps are necessary to maintain their client agencies' confidences.

Outside Counsel

Agencies occasionally want to employ outside (private) legal counsel. There are various reasons for this. A board may have an unexpected, special need to obtain additional legal representation. In some cases, agencies may seek outside counsel for advice or representation requiring specialized legal expertise not available from the Office of the Attorney General. Under Government Code § 402.0212 and § 55 of Article IX of the General Appropriations Act, all contracts for outside counsel must be approved by the Office of the Attorney General.

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[234] *Public Util. Comm'n of Texas v. Cofer*, 754 S.W.2d 121, 123 (Tex. 1988).

Open Government:

A Brief Summary of the Open Meetings Acts and Public Information

The Texas Open Meetings Act was enacted in 1967 and was substantially amended in 1973. The Public Information Act was enacted in 1973 and has undergone various revisions since then. Since the inception of these laws, the basic tenets of open government have remained the same. The basis for the policy of open government is the American constitutional form of representative government and the principle that government is the servant, not the master, of the people.

Since a comprehensive treatment of these two Acts is beyond the scope of this Handbook, this section provides only a brief summary of each Act. The Office of the Attorney General prepares separate handbooks on the Open Meetings Act and the Public Information Act. Information on how to order these or any other Office of the Attorney General publications may be found on page 1 of this Handbook. All handbooks are also available on the OAG website.

Mandatory Open Government Training

Public officials are required to take open government training consisting of a one-hour educational course on the Open Meetings Act and a one-hour educational course on the Public Information Act (PIA).[235] Training is not to exceed a maximum of four hours. A newly elected or appointed official has 90 days after the oath of office is taken or duties are otherwise assumed to complete the required training. Each elected or appointed official who is a member of a governmental body subject to the Open Meetings Act or the PIA must attend training. Additionally, employees who serve as a governmental body's designated public information coordinator are required to complete the PIA training course. A public official may be exempt from PIA training if the official's governmental body employs a designated public information coordinator who is responsible for responding to PIA requests on behalf of the governmental body, and the public information coordinator completes the training. There are no other exemptions for those subject to either the OMA or PIA. The Attorney General strongly encourages all officials to complete the required PIA training. Designation of a public information coordinator to complete training on their behalf does not relieve the public official of his or her duty to comply with the law. For more information on training, visit the OAG Web site at www.oag.state.tx.us.

The Texas Open Meetings Act

The Texas Open Meetings Act provides that meetings of governmental bodies must be open to the public, except for expressly authorized executive or closed sessions, and that the public must be given notice of the time, place and subject matter of meetings of governmental bodies. The definitions of "governmental body," "meeting" and "deliberation" work together to establish which public bodies are subject to the Act, and when gatherings of the members of a governmental body must comply with its requirements. The requirement that every meeting of a governmental body

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[235] TEX. GOV'T CODE ANN. §§ 551.005, 552.012.

must be open to the public presupposes that a meeting is physically accessible to the public.[236] Accordingly, a governmental body may not hold a meeting in a location that is not accessible to the public even by videoconferencing.[237]

Nearly all state agencies are subject to the Act. The definition of "governmental body" includes: "a board, commission, department, committee, or agency within the executive or legislative branch of state government that is directed by one or more elected or appointed members."[238] Other governmental bodies subject to the Act include county commissioners courts; city councils; school district boards of trustees, including boards of open-enrollment charter schools; county boards of education; housing authorities created under Chapter 392 of the Local Government Code; certain nonprofit water supply or wastewater corporations; certain mandatory property owners' associations; local workforce development boards; and nonprofit corporations eligible to receive federal community service block grants.[239] Also included is every "deliberative body having rulemaking or quasi-judicial power and that is classified as a department, agency, or political subdivision of a county or municipality."[240] An analysis of a public entity's powers is necessary to determine whether it fits within this description. A committee of a municipality or a county may not be subject to the Act if it only makes recommendations.[241]

The requirements of the Open Meetings Act apply to a governmental body when it engages in a regular, special called, or emergency meeting.[242] A meeting is generally defined as:

> **a deliberation between a quorum of a governmental body, or between a quorum of a governmental body and another person, during which any public business or public policy over which the governmental body has supervision or control is discussed or considered or during which the governmental body takes formal action.**[243]

The Act defines "deliberation" as:

> **a verbal exchange during a meeting between a quorum of a governmental body, or between a quorum of a governmental body and another person, concerning**

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236 Op. Tex. Att'y Gen. No. JC-0053 (1999).

237 Op. Tex. Att'y Gen. No. JC-0487 (2002) (UT's Board of Regents may not hold a meeting in Mexico); Op. Tex. Att'y Gen. No. JC-0053 (1999) (highly unlikely that a meeting of a Texas governmental body in an underwriter's office in New York City, half a continent's distance from the state, is accessible to the public for purposes of the Act).

238 TEX. GOV'T CODE ANN. § 551.001(3)(A).

239 TEX. GOV'T CODE ANN. §§ 551.001(3)(A)-(C), (E)-(J), and 551.015.

240 TEX. GOV'T CODE ANN. § 551.001(3)(D).

241 *See City of Austin v. Evans*, 794 S.W.2d 78, 83-84 (Tex.App.–Austin 1990, no writ) (city's grievance committee that only makes recommendations is not a deliberative body with rulemaking authority); Op. Tex. Att'y Gen. No. GA-0361 (2005) (county election commission is not a governmental body under Act); Op. Tex. Att'y Gen. No. GA-0504 (2007) (group of local elected and appointed officials and public employees who call themselves the Jail Population Control Committee and meet to share information about jail conditions does not supervise or control public business or public policy and is accordingly not subject to the Act).

242 TEX. GOV'T CODE ANN. § 551.002.

243 TEX. GOV'T CODE ANN. § 551.001(4).

> **an issue within the jurisdiction of the governmental body or any public business.**[244]

The courts have construed "verbal exchange" to mean the "reciprocal giving and receiving of spoken words."[245] The Attorney General has declined to interpret the definition of "deliberation" to exclude all forms of nonspoken exchange, such as written materials or electronic mail.[246]

A quorum of a governmental body is defined in the Act as "a majority of the governmental body, unless defined differently by applicable law, rule or the charter of the governmental body."[247] One court has concluded that telephone calls from one board member to another and conversations between two board members about board business do not constitute a "meeting" when the governmental body is comprised of 5 members, because a quorum of the members was not involved. The court also found that the Act was not violated, because there was no evidence that the members were attempting to circumvent the Act by conducting telephone polling with each other or attempting to avoid meeting in a quorum through use of the telephone.[248]

An informational meeting of a governmental body that is by invitation only contravenes the Open Meetings Act if a quorum of members of the governmental body is present or otherwise participates in the deliberations. If a quorum is not present and does not otherwise participate in the deliberations, the informational meeting is not subject to the Act.[249]

A subcommittee chosen by a governmental body from its membership may also be subject to the Act when the committee meets to discuss and take action on public business, even though it consists of less than a quorum of the governmental body.[250] However, an ad hoc intergovernmental working group not comprised of any members of the appointing governmental bodies has been found not to be subject to the Act.[251]

Not every gathering of a quorum constitutes a meeting subject to the Act. A quorum of a governmental body may attend a regional, state or national convention or workshop, ceremonial event or press conference, if formal action is not taken and any discussion of public business is incidental to the convention or workshop, ceremonial event or press conference.[252] Likewise, a quorum of a governmental body may gather at a social function unrelated to the public business of

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244 TEX. GOV'T CODE ANN. § 551.001(2).

245 *Gardner v. Herring*, 21 S.W.3d 767, 771 (Tex.App.–Amarillo 2000), *following Dallas Morning News. Co. v. Board of Trustees*, 861 S.W.2d 532, 537 (Tex.App.–Dallas 1993, writ denied), *but see* Op. Tex. Att'y Gen. No. JC-0307 (2000).

246 Op. Tex. Att'y Gen. No. JC-0307 (2000).

247 TEX. GOV'T CODE ANN. § 551.001(6).

248 *Harris County Emergency Serv. Dist. #11 v. Harris County Emergency Corps*, 999 S.W. 2d 163, 169-170 (Ct. App--Houston [14th District] 1999, no writ).

249 Op. Tex. Att'y Gen. No. GA-0098 (2003).

250 *Willmann v. City of San Antonio*, 123 S.W.3d 469 (Tex. App. – San Antonio 2003, pet. denied); Op. Tex. Att'y Gen. No. JM-1072 (1989); *see also* Op. Tex. Att'y Gen. No. JC-0060 (1999); Op. Tex. Att'y Gen. No. H-823 (1976); Op. Tex. Att'y Gen. No. H-238 (1974); Op. Tex. Att'y Gen. No. H-3 (1973).

251 Op. Tex. Att'y Gen. No. JC-0160 (1999).

252 TEX. GOV'T CODE ANN. § 551.001(4)

the governmental body, so long as no discussion of public business occurs.[253] The attendance of a quorum of the members of a governmental body before a legislative body at which one or more of the members only publicly testify, comment or respond to questions by the legislative body is not a meeting of the governmental body within the Act's definition.[254] Accordingly, the agency need not post notice of the attendance of a quorum of members of the governmental body at a legislative meeting.

Employee or third person briefings, where the governmental body only receives information, or asks or receives questions, are now considered meetings that are required to be posted and open to the public if the meeting involves public business or policy over which the governmental body has supervision or control.[255]

Notice of Meetings

The Act requires written notice of all meetings.[256] A governmental body must give the public advance notice of the subjects it will consider in an open meeting or a closed session. Notice is usually sufficient if it alerts the public that some action will be taken on a topic.[257] The word "consideration" alone is sufficient to put the general public on notice that the Commission might act during the meeting.[258] **[See Figure 29: Sample Posting for an Open Meeting.]** Broad topics such as "personnel matters," "real estate matters" and "litigation," or vague descriptions such as "Presentation by Council member Smith," are to be avoided. Generally, the more public interest a subject may invoke, the more specific the posting should be.[259] Also, the governmental body's usual practice in formulating notice may be relevant to its adequacy in a particular case, depending on whether it establishes particular expectations in the public about the subject matter of the meeting.[260] Counsel for the governmental body should be consulted if any doubt exists concerning the specificity of notice required for a particular matter. When in doubt, be more specific.

In addition to the substance of the notice, the Act provides specific rules regarding the time and place for posting notice. These posting requirements are mandatory. Seven days' notice, exclusive of the

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253 TEX. GOV'T CODE ANN. § 551.001(4).

254 TEX. GOV'T CODE ANN. § 551.0035; *But see* Op. Tex. Att'y Gen. No. JC-0308 (2000); Op. Tex. Att'y Gen. No. JC-0248 (2000), construing the Act prior to enactment of § 551.0035.

255 TEX. GOV'T CODE ANN. § 551.001(4).

256 TEX. GOV'T CODE ANN. § 551.041.

257 *City of San Antonio v. Fourth Court of Appeals*, 830 S.W.2d 762, 765 (Tex. 1991); *City of San Angelo v. Texas Nat. Res. Conservation Comm'n*, 92 S.W.3d 624 (Tex.App.—Austin 2002, no pet.) (question is not whether the Commission has detailed all possible outcomes of addressing a particular topic, but whether the public is notified that the topic will be part of the meeting); *Friends of Canyon Lake, Inc. v. Guadalupe-Blanco River Authority*, 96 S.W.3d 519, 531 (Tex.App.—Austin 2002, pet. denied) (holding notice sufficient even though agenda description "might not inform the casual reader of the precise consequences"). *Cox Enter., Inc. v. Board of Trustees*, 706 S.W.2d 956, 958 (Tex. 1986); Op. Tex. Att'y Gen. No. GA-0511 (2007).

258 *City of San Angelo*, 92 S.W.3d at 630.

259 *City of San Antonio v. Fourth Court of Appeals*, 820 S.W.2d 762, 765 (Tex. 1991); *Cox Enter., Inc.*, 706 S.W.2d at 958-959; *Gardner*, 21 S.W.3d at 773; *Markowski v. City of Marlin,* 940 S.W.2d 720, 725-26 (Tex. App.—Waco 1997, writ denied); *Hays County Water Planning Partnership v. Hays County, Texas*, 41 S.W.3d 174 (Tex.App.—Austin 2001, pet. denied).

260 *River Rd. Neighborhood Ass'n v. South Texas Sports*, 720 S.W.2d 551, 557 (Tex. App.—San Antonio 1986, writ dism'd w.o.j.).

posting date and the meeting date, must precede all meetings of a governmental body having statewide jurisdiction.[261] The posting requirements for local governmental bodies vary depending on the type of entity.[262] These provisions are quite detailed; therefore, reference to the Act itself is necessary to ensure compliance. Agencies should also consult the Secretary of State's rules governing postings on the *Texas Register* website.[263] The Act also requires posting on the Internet if a county, municipality, school district, junior college or district, economic development corporation, or regional mobility authority maintains a website.[264]

Emergency Meetings

Occasionally, a matter requiring the immediate attention of a governmental body will arise. An emergency meeting or an emergency addition to a previously noticed meeting is authorized in the case of an emergency or urgent public necessity. An emergency or an urgent public necessity exists only if immediate action is required of a governmental body because of:

(1) an imminent threat to public health and safety; or

(2) a reasonably unforeseeable situation.[265]

If an emergency meeting or emergency addition to an agenda is warranted, the normal posting time is shortened to a minimum two hours' notice of the meeting. A governmental body may conduct an emergency meeting only when a true emergency exists.[266] A governmental body must adequately identify the nature of the emergency in its notice.[267] When an emergency meeting is called or an emergency item is added to the agenda, the agency must give specific notice to the news media, in addition to complying with the emergency posting requirements. Only those members of the media that have previously signed up for the special notice and have agreed to reimburse the governmental body for the cost of the notice need be notified.[268] The Act provides that a "sudden relocation of a large number of residents" to a governmental body's jurisdiction as a result of a declared disaster "is considered a reasonably unforeseeable situation for a reasonable period immediately following the relocation." A meeting to address such a situation could be held under the emergency notice provisions, with at least one hour's special notice to the media.[269]

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261 TEX. GOV'T CODE ANN. § 551.044(a) and 1 TEX. ADMIN. CODE § 91.21(a)(1) (West 2004).

262 TEX. GOV'T CODE ANN. §§ 551.049-551.054.

263 1 Tex. Admin. Code ch. 91.

264 TEX. GOV'T CODE ANN. § 551.056.

265 TEX. GOV'T CODE ANN. § 551.045(b).

266 *River Road Neighborhood Ass'n*, 720 S.W.2d at 557; *Garcia v. City of Kingsville*, 641 S.W.2d 339, 341-42 (Tex.App.—Corpus Christi 1982, no writ); *Cameron County Good Gov't League v. Ramon*, 619 S.W.2d 224, 229 (Tex.App.—Beaumont 1981, writ ref'd n.r.e.).

267 *Markowski v. City of Marlin*, 940 S.W.2d at 724; *Piazza v. City of Granger*, 909 S.W.2d 529, 533 (Tex.App.—Austin 1995, no writ).

268 TEX. GOV'T CODE ANN. § 551.047; see also TEX. GOV'T CODE ANN. § 551.052 (notice to news media by school districts).

269 TEX. GOV'T CODE ANN. § 551.045(e).

Conducting an Open Meeting

An open meeting may not be convened unless a quorum of the governmental body is present in the meeting room. **[See Figure 30: Presiding Officer's Script for Public Meeting.]** The public has an absolute right to attend an open meeting; however, the Act does not entitle the public to choose the items to be discussed or to speak at the meeting about items on the agenda.[270] A person may urge members of the governmental body to place a particular subject on an agenda or encourage the members to vote a certain way without violating the criminal provisions of the Act.[271] The Act does permit members of the public to record open meetings by tape recorder or video camera.[272] The enabling statutes of many state agencies include a requirement that the governmental body provide an opportunity for public comment at meetings. Likewise, local governmental bodies schedule public comments as part of their regular meetings.

Only agenda items included in a posted public meeting notice may be considered by the governmental body at an open meeting. For public comments that the governmental body could not reasonably foresee, however, a generic notice such as "public comment," "open forum" or "open mike" is sufficient.[273] If a subject that has not been posted is raised by a member of the governmental board or a member of the public, it is permissible for the governmental body to provide a statement of specific factual information or to recite existing policy in response to an inquiry. Deliberation or a decision on the subject of an inquiry, however, are limited to a proposal to place the subject on a future agenda[274] A governmental body may continue a meeting from day to day without re-posting; however, if a meeting is continued to any day other than the one immediately following, the governmental body must re-post notice.[275]

A governmental body's final action, decision or vote on any matter within its jurisdiction may be taken only in an open session.[276] The governmental body may not vote by secret ballot.[277] It may not take action by written agreement without meeting.[278] If authority to make a decision is delegated to an employee of a governmental body, the decision need not be made at an open meeting.[279] In the usual case, where authority to make a decision or take action is vested in the governmental body, the governmental body must act in an open session.[280]

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270 Op. Tex. Att'y Gen. No. LO-96-111 (1996); Op. Tex. Att'y Gen. No. H-188(1973).

271 Op. Tex. Att'y Gen. No. JC-0307 (2000).

272 TEX. GOV'T CODE ANN. § 551.023.

273 Op. Tex. Att'y Gen. No. JC-0169 (2000).

274 TEX. GOV'T CODE ANN. § 551.042.

275 Op. Tex. Att'y Gen. No. DM-482 (1998); *Rivera v. City of Laredo*, 948 S.W.2d 787 (Tex. App.—San Antonio 1997, writ denied).

276 *Toyah ISD v. Pecos-Barstow ISD*, 466 S.W.2d 377, 378 (Tex.Civ.App.—San Antonio 1971, no writ).

277 Op. Tex. Att'y Gen. No. H-1163 (1978).

278 *Webster v. Texas & Pacific Motor Transp. Co., 166* S.W.2d 75, 76-77 (Tex. 1942); Op. Tex. Att'y Gen. No. JM-120 (1983).

279 *City of San Antonio v. Aguilar*, 670 S.W.2d 681, 686 (Tex.App.—San Antonio 1984, writ dism'd); Op. Tex. Att'y Gen. No. MW-32 (1979).

280 *Davis v. Duncanville I.S.D.*, 701 S.W.2d 15, 17 (Tex.App.—Dallas 1985, writ dism'd).

The Act allows governmental bodies to meet by telephone or video conference call under certain circumstances.[281] With the exception of institutions of higher education, junior college districts and three other named state agencies, a governmental body may meet by telephone conference only if it is an emergency and convening a quorum in one location is difficult or impossible, or if the meeting is held by an advisory body.[282] A teleconference meeting is authorized only in extraordinary circumstances and not merely when attending a meeting on short notice would inconvenience members of the governmental body. If a quorum is present at the meeting location, a teleconference meeting with the missing members is not authorized by the Act.[283] The notice of meeting need not state that a meeting will be conducted as a telephone conference call.[284]

If a local governmental body chooses to conduct a meeting by video conference call, a quorum must be present at a single location and each portion of the open meeting must be visible and audible to the public at each location listed in the meeting notice.[285] A state agency or governmental body that extends into three or more counties may hold a video conference call where a majority of the quorum is in one location and the remaining members of the quorum are in another. The notice of meeting must specify the location where a majority of the quorum will be present and the intent to have a majority of the quorum at that location. [286] Each location listed in the meeting notice must have two-way communication with each other location during the entire meeting.[287] A governmental body must recess or adjourn its meeting if technical difficulties render portions of the meeting inaccessible to the public at a remote location. The governmental body may not avoid having to recess or adjourn the meeting in the event of technical difficulties by specifying in its meeting notice that, if technical difficulties occur, the quorum will continue to conduct its business.[288]

During an open or closed session of a meeting, a governmental body may consult with its attorney by telephone or video conference call, or over the Internet. If the consultation is in a public session, it must be audible to the public. Most governmental bodies may not consult with its attorney using one of these methods if the attorney is an employee of the agency.[289]

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[281] TEX. GOV'T CODE ANN. §§ 551.121-551.126; Op. Tex. Att'y Gen. No. DM-478 (1998).

[282] TEX. GOV'T CODE ANN. §§ 551.121-551.125.

[283] Op. Tex. Att'y Gen. No. JC-0352 (2001); Op. Tex. Att'y Gen. No. JC-0194 (2000).

[284] Op. Tex. Att'y Gen. No. JC-0352 (2001).

[285] TEX. GOV'T CODE ANN. § 551.127.

[286] TEX. GOV'T CODE ANN. § 551.127(c) and (e).

[287] TEX. GOV'T CODE ANN. § 551.127.

[288] Op. Tex. Att'y Gen. No. DM-480 (1998).

[289] TEX. GOV'T CODE ANN. § 551.129.

Closed or Executive Sessions

All meetings of a governmental body are open to the public unless a closed session is specifically authorized.[290] The Act provides certain narrowly drawn exceptions to the requirement that meetings of a governmental body be open to the public. The authorized closed sessions are also commonly known as executive sessions.

For a governmental body to hold a closed session that complies with the Act, a quorum of members of the governmental body must convene in an open meeting pursuant to proper notice, and the presiding officer must announce that a closed session will be held and identify the sections of the Act authorizing the closed session.[291] **[See Figure 31: Presiding Officer's Script for Closed or Executive Session; Figure 32: Sample Posting of Agenda Item to Terminate an Agency's Executive Director; and Figure 33: Sample Posting of Agenda Item to Discuss Legal Matters in a Closed Session.]** An executive session may be continued from one day to the next, so long as, before convening the closed session on the second day, the governmental body first meets in open session in accordance with section 551.101 of the Act.[292] The Act does not require prior written notice that an agency will meet in closed session as long as the subject matter of the session has been properly posted.[293] A governmental body may include in its posting a general notice that the entity may go into closed session as permitted by the Act, or provide specific notice of an intent to do so if planned at the time of posting. **[Compare Figures 29, 32, and 33.]** A word of caution: if a particular posting abruptly departs from a customary practice of distinguishing between the items to be discussed in open session and those to be discussed in closed or executive session, a question may arise as to its adequacy to inform the public of the subjects to be discussed at the meeting.[294] To avoid having to defend against a claimed violation of the Act, a governmental body should not change its practice in a meeting before making corresponding changes in its postings.[295]

A governmental body may conduct a closed session to discuss:

- **pending or contemplated litigation or settlement offers with counsel or to obtain legal advice from counsel;[296]**
- **real estate, if deliberation in an open meeting would have a detrimental effect on the governmental body's negotiating position;[297]**
- **prospective gifts, if deliberation in an open meeting would have a detrimental effect on the governmental body's negotiating position;[298]**

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290 TEX. GOV'T CODE ANN. §§ 551.002 and 551.071-551.085.

291 TEX. GOV'T CODE ANN. § 551.101.

292 Op. Tex. Att'y Gen. No. JC-0285 (2000).

293 Op. Tex. Att'y Gen. No. JC-0057 (1999).

294 Op. Tex. Att'y Gen. No. JC-0057 (1999); *River Rd. Neighborhood Ass'n v. South Texas Sports*, 720 S.W.2d at 557.

295 *See* JC-0057; *River Rd. Neighborhood Ass'n.*

296 TEX. GOV'T CODE ANN. § 551.071.

297 TEX. GOV'T CODE ANN. § 551.072.

298 TEX. GOV'T CODE ANN. § 551.073.

- **certain personnel matters or to hear a complaint against an officer or employee; or**[299]

- **the deployment of security personnel or devices or a security audit.**[300]

The Act also authorizes certain types of state agencies or political subdivisions to meet in closed session on certain subjects. For example, licensing boards may consider certain test items in closed session.[301] County commissioners courts may discuss certain personnel matters involving members of advisory committees or complaints against the members.[302] School boards may discuss matters involving the discipline of a child or certain complaints against district employees.[303] Certain governmental bodies, such as the Department of Insurance, Board of Pardons and Paroles and the Credit Union Commission, may consider specific subjects in closed session.[304] Statutory authorization to conduct closed sessions may appear in statutes other than the Open Meetings Act. An example is the Finance Commission's enabling statute, which authorizes the Commission to receive financial information regarding supervised institutions in closed session.[305]

The foregoing discussion is not exhaustive of all instances when governmental bodies are authorized to conduct closed meetings. Readers are advised to study the Act and other applicable laws to determine whether or not a particular governmental body is authorized to conduct executive sessions.

Only authorized persons may attend a closed session; that primarily means the members of the governing body and any employee necessary for the discussion to be held.[306] A governing body may not invite members of the public into a closed meeting to provide comment.[307]

While a governmental body may meet in a closed session, it may not take any final vote or action in an executive session.[308] The actual decision has to be made in public.[309] This prohibition, however, does not restrict members in a closed session from expressing their opinions on an issue or announcing

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299 TEX. GOV'T CODE ANN. § 551.074; *Gardner v. Herring*, 21 S.W.3d 767, 777 (Tex.App.—Amarillo 2000) (.074 does not authorize closed discussions about policy and its application to employees in general or a class of unnamed employees).

300 TEX. GOV'T CODE ANN. § 551.076.

301 TEX. GOV'T CODE ANN. §551.086.

302 TEX. GOV'T CODE ANN. § 551.0745.

303 TEX. GOV'T CODE ANN. § 551.082.

304 TEX. GOV'T CODE ANN. §§ 551.079-.081.

305 FINANCE CODE ANN. § 96.111.

306 Op. Tex. Att'y Gen. No. JC-0375 (2001) at 2 (school board may require its superintendent to attend all of its closed~meetings); see also Op. Tex. Att'y Gen. Nos. JC-0506 (2002) at 6 (commissioners court may include county auditor in closed meeting), JM-238 (1984) at 5 (commissioners court, meeting in closed session to discuss pending litigation with its attorney, may admit to closed session those county officers and employees within the attorney-client privilege of commissioners court).

307 Op. Tex. Att'y Gen. No. GA-0511 (2007).

308 TEX. GOV'T CODE ANN. § 551.102; *Nash v. Civil Serv. Comm'n, Palestine*, 864 S.W.2d 163, 166 (Tex.App.—Tyler 1993, no writ); *Board of Trustees v. Cox Enter.*, 679 S.W.2d 86, 89 (Tex.App.—Texarkana 1984), *aff'd in part*, *rev'd in part on other grounds*, 706 S.W.2d 956, 958 (Tex. 1986); *Toyah ISD v. Pecos-Barstow I.S.D.*, 466 S.W.2d 377, 378 (Tex.Civ.App.—San Antonio 1971, no writ).

309 *Board of Trustees v. Cox Enter.*, 679 S.W.2d 86, 89 (Tex.App.—Texarkana 1984), *aff'd in part*, *rev'd in part on other grounds*, 706 S.W.2d 956, 958 (Tex. 1986).

how they expect to vote on the issue in the open meeting, so long as the actual vote or decision is made in the open session.[310] Nevertheless, the presiding officer in a closed session should use caution in polling the other members or otherwise taking a "straw vote," which could be construed as being a final vote. After returning to public session, the presiding officer should formally take and record any action or decision on a closed session matter only after providing full opportunity for further discussion.

Minutes

The Act requires a governmental body to "prepare and keep minutes or make a tape recording of each open meeting of the body."[311] If minutes are kept instead of a tape recording, the minutes must indicate the subject of each deliberation and the vote, order or decision made on each item.[312] The minutes or tape recordings must be made available to the public upon request.[313] The Act also requires that a governmental body make and keep either a certified agenda or a tape recording of each closed session, except for a closed session held by the governmental body to consult with its attorney.[314] **[See Figure 34: Sample Certified Agenda of Closed Session.]** If a certified agenda is kept, the presiding officer must certify that the agenda is a true and correct record of the closed session. The certified agenda must reflect the date and time at the beginning and end of the closed session and the subject matter of each deliberation.

Violations of the Open Meetings Act

Several remedies are available to the public when a governmental body violates the Act. Any action taken by the governmental body in an unlawful meeting is voidable.[315] Any interested person may bring a mandamus or injunction action to stop, prevent or reverse a violation of the Act.[316] Additionally, members of a governmental body are subject to criminal penalties in the following situations:

- **if they knowingly conspire to circumvent the Act by meeting in numbers less than a quorum for the purpose of secret deliberations;**[317]
- **if they knowingly call or aid in calling or participate in an unauthorized closed meeting;**[318]
- **if they participate in a closed meeting knowing that a certified agenda or tape recording is not being made;**[319] **or**

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310 *Id.*; *Thompson v. City of Austin,* 979 S.W.2d 676, 685 (Tex.App.–Austin 1998, no pet.); *Nash* at 166; *City of Dallas v. Parker*, 737 S.W.2d 845, 850 (Tex.App.—Dallas, 1987, no writ).

311 TEX. GOV'T CODE ANN. § 551.021(a).

312 TEX. GOV'T CODE ANN. § 551.021(b).

313 TEX. GOV'T CODE ANN. § 551.022.

314 TEX. GOV'T CODE ANN. § 551.103(a).

315 TEX. GOV'T CODE ANN. § 551.141.

316 TEX. GOV'T CODE ANN. § 551.142.

317 TEX. GOV'T CODE ANN. § 551.143; Op. Tex. Att'y Gen. No. GA-0326 (2005).

318 TEX. GOV'T CODE ANN. § 551.144(a)(1), (3); *Tovar v. State*, 978 S.W.2d 584 (Tex.Crim.App. 1998).

319 TEX. GOV'T CODE ANN. § 551.145.

- **if they knowingly disclose to a member of the public a certified agenda or tape recording of a closed session.**[320]

The Texas Public Information Act

The Texas Public Information Act[321] declares that information in the possession of a governmental body is public information and open to the public unless it falls within one of the Act's specific exceptions to disclosure.[322] The definition of "governmental body" encompasses all public entities in the executive and legislative branches of government at the state and local levels, including county commissioners courts, district and county attorneys, municipal governing bodies, school districts, county boards of school trustees, county boards of education, special districts, the governing bodies of certain nonprofit corporations that provide water supply or wastewater services, local workforce development boards, and nonprofit corporations eligible to receive federal community service block grants.[323] In addition, an entity that is supported by public funds, that spends public funds, or that contracts with a governmental body to maintain its records, is a governmental body under the Act. The Act, however, expressly excludes the judiciary from the definition of a governmental body[324] and provides that access to information of the judiciary is governed by rules of the Texas Supreme Court or other applicable rules and laws.[325]

The Act applies to information recorded in practically any form, including book, paper, letter, document, printout, photograph, film, tape, microfiche, microfilm, photostat, sound recording, map, drawing or voice or video representation held in computer memory.[326] It does not include tangible items such as tools or keys used for storing information.[327] The Act applies only to information already in existence, and does not require a governmental body to create a document.[328] Likewise, the Act does not require a governmental body to perform legal or library research or to answer questions.[329] A governmental body is not required to produce information that is commercially available to the public, unless the information is a part of, incorporated into or referred to in a rule or policy of the governmental body.[330] In addition, a governmental body is not required under the Act to accept or comply with a request for information from an individual or his or her agent, except for an attorney, who is imprisoned or confined in a correctional facility.[331]

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320 TEX. GOV'T CODE ANN. § 551.146. Any unauthorized person, partnership, or corporation may be prosecuted for a violation of this section, not just a member of a governmental body.

321 The Texas Public Information Act is also commonly called the Texas Open Records Act.

322 TEX. GOV'T CODE ANN. §§ 552.002(a) and 552.006.

323 TEX. GOV'T CODE ANN. § 552.003(1).

324 TEX. GOV'T CODE ANN. § 552.003(1)(B).

325 TEX. GOV'T CODE ANN. § 552.0035.

326 TEX. GOV'T CODE ANN. § 552.002(c).

327 Tex. Att'y Gen. ORD-581 (1990).

328 Tex. Att'y Gen. ORD-452 (1986); Tex. Att'y Gen. ORD-342 (1982); *see also* Tex. Att'y Gen. ORD-572 (1990); Tex. Att'y Gen. ORD-555 (1990).

329 Tex. Att'y Gen. ORD-563 (1990); Tex. Att'y Gen. ORD-555 (1990); *see also* TEX. GOV'T CODE § 552.227.

330 TEX. GOV'T ANN. CODE § 552.027.

331 TEX. GOV'T ANN. CODE § 552.028.

The Act deals primarily with the general public's access to information. Information that a governmental body collects, assembles or maintains is, in general, either open to all members of the public or closed to all members of the public. The Act generally prohibits a governmental body from selectively disclosing information and requires a governmental body to process requests uniformly, without regard to the identity of requestors.[332] However, the Act provides individuals with special rights of access to information concerning themselves, particularly personnel information.[333] The Act further allows members, agencies and committees of the legislature to receive information, including confidential information, for legislative use.[334]

The purpose for which a requestor wants public information is irrelevant to the governmental body's duty to disclose the information. A governmental body is expressly limited in the questions it may ask a requestor in responding to the request.[335] A governmental body may ask a requestor to clarify a vague request or to narrow an overly broad request.[336] **[See Figure 35: Response to Request for Public Information, Asking for Clarification, and Figure 36: Response to Request for Public Information, No Documents Found.]** If a governmental body has not received a response from a requestor by the 61st day after a written request for clarification was sent, the request for information may be considered withdrawn.[337] In order for a request for information to be considered withdrawn, the governmental body must provide written notice of the consequences of failing to timely respond in its request for clarification and send such request by certified mail if the request for information includes a physical or mailing address for the requestor.[338] **[See Figure 35]**

Upon receipt of a written request for information, a governmental body must either promptly produce the requested information or seek a decision from the Attorney General if the governmental body believes that an exception to disclosure applies to the requested information.[339] A governmental body need not seek a decision from the Attorney General if it has received a prior determination from the Attorney General on the precise information being requested.[340] Also, a governmental body should check Attorney General open records decisions routinely to see if the Attorney General has issued a decision that may be used as a previous determination even if another agency asked for the decision.[341]

The prompt release of information requires release as soon as possible under the circumstances, that is, within a reasonable time, without delay. Neither Section 552.221(d) nor Section 553.301 entitles a governmental body to automatically withhold for ten business days public information not excepted

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332 TEX. GOV'T CODE ANN. §§ 552.007(b) and 552.223.

333 TEX. GOV'T CODE ANN. §§ 552.023 and 552.102(a).

334 TEX. GOV'T CODE ANN. § 552.008.

335 TEX. GOV'T CODE ANN. § 552.222(a); *see also Industrial Found. of the S. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 674 (Tex. 1976) (the motives of a requestor are not to be considered in determining whether the information may be disclosed).

336 TEX. GOV'T CODE ANN. § 552.222(b); Tex. Att'y Gen. ORD-663 (2000).

337 TEX. GOV'T CODE ANN. § 552.222(c)-(f).

338 TEX. GOV'T CODE ANN. § 552.222(e) and (f).

339 TEX. GOV'T CODE ANN. §§ 552.221(a) and 552.301(a); Tex. Att'y Gen. ORDs–664 and 665 (2000).

340 Tex. Att'y Gen. ORD-673 (2001). Read this opinion carefully before concluding that an Attorney General's decision is not needed in order to withhold information from a requestor.

341 *See* Tex. Att'y Gen. ORD-670 (2001), allowing all governmental bodies to withhold section 552.117(2) information without the necessity of a ruling from the Attorney General.

from disclosure.[342] **[See Figure 37: Response to Request for Public Information, Claiming Exceptions.]** If a governmental body has previously received a determination from the Attorney General or a court that the precise information in a pending request must be released, then the governmental body is prohibited from requesting another decision. The governmental body's only recourse is to release the information.[343]

Requesting an Open Records Decision from the Attorney General

Before a governmental body asks for a decision from the Attorney General, it must first have made an initial finding that it in good faith reasonably believes the requested information is excepted from disclosure.[344] A governmental body must request a decision from the Attorney General no later than the tenth business day after receipt of the request;[345] otherwise, the requested information is presumed public.[346] When asking for a decision, a governmental body must properly raise each exception it is claiming.[347] The Act now expressly provides that if an exception is not properly raised before the Attorney General, then the exception may not be raised in any subsequent lawsuit filed under the Act. This waiver provision does not apply to information made confidential by federal law or involving the property or privacy interest of a person.[348] To guard against waiving an applicable exception, a governmental body should ensure compliance with each requirement governing a request for an Attorney General's decision, as follows:

No later than the 10th business day after receipt of a request for information:

1. submit the governmental body's request for a decision, stating each claimed exception;

No later than the 15th business day after receipt of a request for information:

2. provide written comments stating the reasons why the exception applies for each claimed exception.[349] This usually requires providing specific facts that demonstrate an exception's applicability to the information;

3. provide a copy of the request for information;

4. provide copies of the requested information labeled to indicate which exceptions apply to which portions of the information. If the information is voluminous, the governmental body may submit a representative sample; and

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342 Tex. Att'y Gen. ORD–664 (2000).

343 TEX. GOV'T CODE ANN. § 552.301(f).

344 Tex. Att'y Gen. ORD-665 (2000).

345 TEX. GOV'T CODE ANN. §§ 552.221(d) and 552.301(a).

346 TEX. GOV'T CODE ANN. § 552.302.

347 TEX. GOV'T CODE ANN. §§ 552.301 and 552.303.

348 TEX. GOV'T CODE ANN. § 552.326.

349 TEX. GOV'T CODE ANN. § 552.301.

5. include a signed statement as to the date on which the entity received the request for information or sufficient evidence establishing the date. [350]

The Attorney General may ask the governmental body requesting the decision for more information in order to render a decision; if the governmental body does not comply within seven days, the requested information is presumed public.[351]

A governmental body must also timely notify the requestor in writing that it has asked for an Attorney General's decision and provide the requestor with copies of its submissions to the Attorney General except for the requested information at issue or information in its submissions that reveals the information.[352] **[See Figure 37: Response to Request for Public Information, Claiming Exemptions.]** Lastly, the governmental body must make a good faith effort to provide written notice, as provided in the Act, to any person whose proprietary information may be affected when the governmental body claims exception to disclosure under Sections 552.101, 552.110, 552.113 or 552.131 of the Act.[353]

If the above steps are not followed by the governmental body, the Attorney General may decline to rule on any claimed exception and hold that the information is presumed public and must be released, because the governmental body did not properly ask for an Attorney General's opinion.[354]

Once the Attorney General has determined that requested information must be released, the governmental body must comply or file suit challenging the decision no later than 30 days from receipt of the ruling.[355]

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350 TEX. GOV'T CODE ANN. § 552.301.

351 TEX. GOV'T CODE ANN. § 552.303(b)-(e).

352 TEX. GOV'T CODE ANN. § 552.301(d).

353 TEX. GOV'T CODE ANN. § 552.305.

354 TEX. GOV'T CODE ANN. § 552.302.

355 TEX. GOV'T CODE ANN. § 552.324(b).

Inspection and Copies of Public Information and Associated Charges

The Act contains procedures for responding to a request for information, including associated charges. A requestor may ask for information in either paper, electronic or magnetic form. A governmental body must provide public information in the medium requested if it may legally do so and has the means to do so.[356] Unless a requestor agrees to accept access to information via an agency's website, a governmental body does not comply with the Act by simply advising a requestor that the information is available on its website.[357] If the governmental body cannot immediately provide the information, it must within ten days notify the requestor in writing of a reasonable date and time at which the information will be available.[358] If compliance with a request requires computer programming or manipulation of data, and if such programming or manipulation is not feasible or can be accomplished only at the cost of the programming or manipulation, the governmental body must explain the situation in written detail to the requestor within 20 days. The governmental body must inform the requestor that the information is not available in the requested form and provide a description of the form in which it is available. The governmental body must detail any contract or services that would be required in order to provide the information in the requested form and a statement of the estimated time and cost of doing so. A governmental body may have an additional ten days to fully explain the situation if it notifies the requestor that it needs additional time. Once this statement is provided to the requestor, the governmental body has no further obligation to provide the information in the requested form, unless the requestor replies in writing that the information is still wanted in the requested form, according to the cost and time parameters given by the governmental body.[359] If the requestor does not answer the governmental body's correspondence withing the time prescribed by Sect. 552.231, the governmental body may consider the request withdrawn.

The Act allows a governmental body to either provide a copy to the requestor or make the information available for inspection.[360] **[See Figure 38: Response to Request for Public Information, Making Documents Available.]** The Act requires a governmental body to allow inspection at least during business hours[361] and must do so in a place that allows requestors to take advantage of their rights under the Act.[362] A requestor must complete the inspection within ten business days of the date the custodian makes the information available, but the requestor may request additional time.[363] If the governmental body chooses to make information available by sending a copy to the requestor, the governmental body's action is timely if it mails the information within the applicable time period.[364] The Act does not require a governmental body to provide duplicate copies of information which a requestor has previously requested and received or which has been made available. Instead, the

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356 TEX. GOV'T CODE ANN. § 552.228(a) and (b).

357 Tex. Att'y Gen. ORD-682 (2005).

358 TEX. GOV'T CODE ANN. § 552.221(b).

359 TEX. GOV'T CODE ANN. § 552.231.

360 TEX. GOV'T CODE ANN. § 552.221(b).

361 TEX. GOV'T CODE ANN. § 552.021.

362 TEX. GOV'T CODE ANN. § 552.224.

363 TEX. GOV'T CODE ANN. § 552.225.

364 TEX. GOV'T CODE ANN. § 552.308.

governmental body may respond in writing to the requestor, as required by the Act, to inform the requestor of the previous request and response.[365]

The governmental body may charge the requestor for most costs incurred in providing copies of the requested public information.[366] Costs for merely inspecting information are limited to the cost of making a photocopy of a page from which confidential information may be redacted and personnel costs for retrieving information in paper form that is more than five years old or fills more than six archival boxes and for which the officer for public information has estimated that more than five hours will be needed to compile the information. For governmental bodies with fewer than 16 employees, the cut-off for payment or deposit is three years, three boxes and two hours.[367] The Act does not authorize a governmental body to charge for providing a governmental publication that is otherwise free.[368] Neither may a governmental body charge for electronic copies of public information that is available by direct access to its Internet website.[369] The Attorney General's Office is charged with establishing rules for use by each governmental body in determining charges. A governmental body, excluding a state agency, may determine its own charges as long as they do not exceed the OAG charges by 25 percent, unless an exemption has been granted by OAG. A governmental body may provide copies of documents at a reduced price or even at no cost.[370] **[Figure 39: Response to Request for Public Information, No Charge for Copies.]**

If a governmental body estimates that copies or inspection of information will result in an amount that exceeds $40, the entity must provide to the requestor a written itemized estimate of charges to which the requestor must timely respond or the request is considered withdrawn. The Act sets out the contents of the estimate, the procedure if the estimate is increased to greater than 20 percent of the original estimate, and the maximum allowable charge for copying or inspection in this situation.[371] A governmental body may require a deposit or bond for payment if the cost for the information exceeds $100 for a governmental body with more than 15 employees, and $50 for a governmental body with fewer than 16 employees. A requestor must provide the required bond or deposit before the 10th business day after the date a governmental body requires such bond or deposit, or the request for information is considered withdrawn. Before preparing copies in response to a new request, a governmental body may also require a bond or deposit for documented, unpaid amounts relating to previous requests if those amounts exceed $100.[372]

A governmental body may now recoup its actual costs, including cost of materials, personnel time, and overhead, from a requestor who makes numerous requests or asks for a large amount of information. The Act allows a governmental body to set a limit, not less than 36 hours for a requestor in a 12-month period, for the amount of time that personnel is required to spend on responding to a request for information. The Act sets out conditions for such time limit and steps a governmental body must follow in order to impose such time limit on a requestor. The time limit may not be imposed on a

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365 TEX. GOV'T CODE ANN. § 552.232.

366 *See* TEX. GOV'T CODE ANN. §§ 552.261, 552.271, and 552.272.

367 TEX. GOV'T CODE ANN. § 552.271.

368 TEX. GOV'T CODE ANN. § 552.270.

369 Tex. Att'y Gen. ORD-668 (2000).

370 TEX. GOV'T CODE ANN. § 552.267.

371 TEX. GOV'T CODE ANN. § 552.2615.

372 TEX. GOV'T CODE ANN. § 552.263.

member of the media, elected officials, or a representative of a publicly funded legal services organization exempt from federal income taxes.[373]

A requestor who believes a governmental body has charged too much may seek review of charges by the Attorney General.[374] If the requestor was over charged because an agency fails or refuses to follow OAG rates, the requestor may be entitled to receive three times the amount of the overcharge.[375]

Each governmental body must display a sign, at one or more locations in the administrative offices of the entity, that contains basic information about the right to information and the procedures to be followed. The sign must be plainly visible to the public and employees of the governmental bodies who receive or respond to requests. The sign must conform to OAG rules.[376]

For more information on permissible charges under the PIA, you may contact Hadassah Schloss at (512) 475-2497 or visit the Attorney General Web site at: www.oag.state.tx.us.

Information Excepted from Disclosure

The Act includes exceptions to required public disclosure of information.[377] A governmental body is free, however, to voluntarily disclose records otherwise protected from public disclosure, unless the disclosure is specifically prohibited or the records are deemed confidential under the law.[378] The Act sets out 18 categories of information that are public information and must be released unless they are expressly made confidential by some law other than the Public Information Act.[379] The Act's exceptions to disclosure can no longer be used to withhold these categories of information from the public.

Below is a list of some of the information that is excepted from disclosure:

- **information required to be kept confidential by law, either constitutional, statutory, or by judicial decision;**
- **information contained in a person's personnel file, if the release of such information would constitute an unwarranted invasion of that person's common-law privacy interests, as well as educational transcripts of professional public school employees;**
- **information, relating to pending or reasonably anticipated litigation (called the "litigation exception");**
- **attorney work product;**

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373 TEX. GOV'T CODE ANN. § 552.275.

374 TEX. GOV'T CODE ANN. § 552.269.

375 TEX. GOV'T CODE ANN. § 552.269(b).

376 TEX. GOV'T CODE ANN. § 552.205.

377 TEX. GOV'T CODE ANN. §§ 552.101-552.132.

378 TEX. GOV'T CODE ANN. § 552.007(a).

379 TEX. GOV'T CODE ANN. § 552.022.

- **information revealing interests of a governmental body in situations such as competitive bidding and requests for proposals;**

- **information relating to interests of a governmental body's planning and negotiating position with respect to particular transactions usually involving real estate;**

- **information concerning the deliberative processes of a governmental body relating to the enactment of legislation, but not including purely factual material;**

- **an internal bill analysis or working paper prepared by the Governor's office for the purpose of evaluating proposed legislation;**

- **information within the attorney-client communications privilege or information that a court has ordered not be disclosed;**

- **information prepared by or reflecting the mental impressions or legal reasoning of an attorney representing the state in anticipated or pending criminal litigation;**

- **information relating to an on-going criminal case;**

- **information dealing with the detection, investigation, or prosecution of a crime only in relation to an investigation that concluded in a result other than conviction or deferred adjudication (closed case);**

- **correspondence or other communications the disclosure of which would invade the privacy interests of elected office holders;**

- **information relating to real property sales prices, descriptions, and characteristics received from a private entity by the State Comptroller or a chief appraiser of an appraisal district;**

- **trade secrets;**

- **commercial or financial information if disclosure would cause substantial competitive harm to the person from whom the information was obtained;**[380]

- **certain investment information prepared or provided by a private investment fund;**[381]

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[380] TEX. GOV'T CODE ANN. § 552.110(b).

[381] Tex. Gov't Code Ann. § 552.143; *but see* Tex. Gov't Code Ann. § 552.0225(b), for investment information that is subject to public disclosure.

- **internal communications consisting of advice, recommendations, or opinions of staff that reflect the policy making processes of governmental bodies, but not including information relating to routine administrative or personnel matters or purely factual information;**

- **specific examination, operating, or condition reports obtained by agencies in regulating or supervising financial institutions or securities, or information that indirectly reveals the contents of such reports;**

- **geological or geophysical information or data, including maps concerning wells, except information filed in connection with an application or proceeding before an agency, and except certain information filed with the General Land Office during certain time periods;**

- **educational records made confidential by the federal Family Educational Rights and Privacy Act (called the "student records" exception);**

- **birth and death records;**

- **Texas no-call list;**

- **audit working papers, including draft audit reports, of the state auditor or the auditor of another state agency, an institution of higher education, a county, a municipality, school district or an airport joint board;**

- **trade secrets or commercial or financial information relating to economic development negotiations with a business prospect;**

- **financial or other incentives offered to an economic development business prospect until and unless an agreement is made with the business prospect;**[382]

- **information relating to the identity of a crime victim;**

- **information relating to the home addresses, telephone numbers, social security numbers, and personal family information of public officials and employees who elect to withhold such information from public disclosure;**

- **information relating to the home addresses and telephone numbers, social security numbers, and personal family information of certain peace officers, officers and employees of a community supervision and corrections department, and Texas Department of Criminal Justice employees, whether or not they elect to withhold such information from public disclosure;**

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[382] TEX. GOV'T CODE ANN. § 552.131(b).

- **information relating to the home address and telephone number, social security number, date of birth, and e-mail address of a Texas-licensed attorney who elects to withhold such information from public disclosure;**

- **personal information of a minor who participates in a municipal recreation program or activity;**

- **social security number of a living person, but a county or district clerk may disclose in the ordinary course of business a number contained in the clerk's office. Upon request, the clerk may redact all but the last four digits of a number unless otherwise required by law to be maintained;**

- **information on or derived from a triplicate prescription form filed with the Department of Public Safety under Section 481.075 of the Health and Safety Code;**

- **photographs of peace officers;**

- **certain rare books and manuscripts, and certain oral history interviews, personal papers, unpublished letters, or organizational records of non-governmental entities;**

- **test items;**

- **the name of an applicant for the position of chief executive officer of an institution of higher education or the position of superintendent of a public school district, except for the names of all finalists being considered, which must be released 21 days before a decision to fill the vacancy is made;**

- **certain library records;**

- **certain audit papers privileged under the state Environmental, Health and Safety, Audit Privilege Act;**

- **certain information submitted by a potential vendor or contractor to a governmental body in connection with their application for certification as a historically underutilized or disadvantaged business;**

- **certain neighborhood crime watch organization information that identifies a participant by name, address, and telephone number;**

- **certain personal information found in motor vehicle records; and**

- **the name or information that would substantially reveal the identity of an informer who has furnished a report of a possible violation of a criminal, civil, or regulatory law to a school district or other regulatory authority.**[383]

Violations of the Public Information Act

If a governmental body refuses to request an Attorney General's decision, refuses to provide public information or refuses to provide information after the Attorney General determines it is public and must be released, the requestor or the Attorney General may file suit for a writ of mandamus compelling the governmental body to make the information available for public inspection.[384] A governmental body or other entity whose interests are affected may file suit against the Attorney General to withhold information that the Attorney General has ruled public.[385]

Upon a complaint by a person claiming to be a victim of a violation of the Act, the Attorney General or a district or county attorney may seek declaratory or injunctive relief against a governmental body that violates the Act. The Act sets out the procedures for filing a complaint, venue for suits and designation of the official in charge of any lawsuit filed under this provision, and the assessment of costs and attorney fees if the plaintiff prevails against the governmental body.[386]

Officers and employees of a governmental body, or any other persons, are subject to criminal penalties for:

- **willful destruction, mutilation, removal or alteration of a public document; or**[387]

- **distribution of information confidential under the Act.**[388]

An officer for public information and an agent of the officer are subject to criminal penalties for failure or refusal to provide access to or copies of public information.[389]

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[383] TEX. GOV'T CODE ANN. § 552.131.

[384] TEX. GOV'T CODE ANN. § 552.321.

[385] TEX. GOV'T CODE ANN. §§ 552.324, 552.325, and 552.353.

[386] TEX. GOV'T CODE ANN. §§ 552.3215 and 552.323(a).

[387] TEX. GOV'T CODE ANN. § 552.351.

[388] TEX. GOV'T CODE ANN. § 552.352.

[389] TEX. GOV'T CODE ANN. § 552.353.

Figure 29: Sample Posting for an Open Meeting

AGENDA

[AGENCY]
BOARD MEETING
[DATE, TIME, PLACE]

The [AGENCY] will convene as posted to consider and take formal action, if necessary, on the following agenda items:

1. Roll Call [Procedural items such as 1, 2, 10-13 need not be included in *Texas Register* posting.]
2. Call to Order
3. Minutes from last board meeting
4. Report of the [ENFORCEMENT, RULES, EXECUTIVE, etc.] Committee: [FOR EACH COMMITTEE, LIST SPECIFIC SUBJECTS TO BE COVERED AS REQUIRED BY ACT]
5. General administration, budget, and personnel matters
6. Strategic Plan for the period [YEAR to YEAR]
7. Proposed Rule 73 [OR] Amendments to Rule 73, 22 TAC § 73.56, relating to license renewal [For publication for public comment]
8. Proposed Rule 71 [OR] Amendments to Rule71, 22 TAC § 71.2, relating to application for license, as published in 23 TexReg 4456, October 6, 1999 [For adoption]
9. Pending Enforcement Cases:
   a. Proposal for Decision, [LIST DOCKET NUMBER AND STYLE OF CONTESTED CASE]
   b. Other Cases: [LIST DOCKET NUMBER AND STYLE OF EACH CONTESTED CASE]
   c. Motion for Rehearing, [LIST DOCKET NUMBER AND STYLE OF EACH CONTESTED CASE]
10. Public comment
11. Date for next board meeting
12. Items for future agenda
13. Adjourn

The [AGENCY] may meet in Closed Session on any item listed above if authorized by the Texas Open Meetings Act, Tex. Gov't Code Ann. ch. 551.

Figure 30: Presiding Officer's Script for Conducting a Public Meeting

PRESIDING OFFICER'S SCRIPT FOR CONDUCTING A PUBLIC MEETING

1. Call roll of the members of the governmental body.

2. Call to order the meeting of the [AGENCY] [if a quorum is present]. Announce the presence of a quorum.

3. Approval of Minutes of the last meeting. Minutes are circulated or distributed to members.

   Do I hear a motion that the minutes be approved?
   Is there a second?
   Is there any discussion?
   Are there any changes or clarification to the minutes?

   All those in favor say, 'Aye'; all opposed say, 'No'.

   Motion [PASSES/FAILS].

4. Take up next items listed on agenda, recognizing person responsible for each item.

Consideration of agency rules

Proposed Rule:

Do I hear a motion to approve publishing for public comment proposed rule [TAC CITE] *relating to* [TITLE/SUBJECT OF PROPOSED RULE]?

Adopted Rule:

Do I hear a motion to adopt proposed rule [TAC CITE] *relating to* [TITLE/SUBJECT OF PROPOSED RULE] [AS PUBLISHED] OR [WITH THE CHANGES RECOMMENDED BY AGENCY STAFF/RULES COMMITTEE] OR [WITH THE CHANGES MADE BY THE BOARD TODAY]."

5. Public comment: ask audience if anyone desires to speak, OR if speakers filled out speaker's form, recognize first speaker.

6. Ask members for any items to be placed on next agenda.

7. Set date for next meeting and adjourn:

   If there is no further business, the meeting of the [AGENCY] is adjourned.

Figure 31: Presiding Officer's Script for Closed or Executive Session

PRESIDING OFFICER'S SCRIPT FOR CLOSED OR EXECUTIVE SESSION

IN OPEN SESSION:

The [AGENCY] *will go into closed session at this time, pursuant to the Texas Open Meetings Act, on agenda items* [STATE NUMBERS OF AGENDA ITEMS TO BE CONSIDERED IN CLOSED SESSION][STATE THE EXCEPTIONS FOR THE SESSION; FOR EXAMPLE:

- *to discuss pending litigation with its attorney under section 551.071 of the act;*
- *to receive legal advice from its attorney under section 551.071 of the act; and*
- *to consider personnel matters under section 551.074.*

*All members of the public and staff*are requested to leave the meeting room at this time. The time is* _____.
[*This does not include staff which the governmental body has determined should attend the session.]

[If making a certified agenda, turn tape recorder off. Close door. Convene closed session.]

IN CLOSED SESSION:

This closed session is called to order. The date is _____. *The time is* _____."

[Verify that Secretary/Executive Director/someone is taking notes for certified agenda or that tape recorder is on. Not necessary for sessions solely under § 551.071.]

****
[At end of closed session]

This closed session is ended. The date is _____. *The time is* _____.

[Open door, turn on tape recorder and reconvene.]

The board is now reconvened in open session at _____[state time].

[Take up agenda items discussed in closed session.]

Are there any motions on agenda item _____.

[Repeat as necessary for all agenda items on which action is to be taken. Continue on with remaining agenda.]

Figure 32: Sample Posting of Agenda Item to Terminate an Agency's Executive Director

AGENDA

[AGENCY]
BOARD MEETING
[DATE, TIME, PLACE]

The [AGENCY] will convene as posted to consider and take formal action, if necessary, on the following agenda items:

1. Roll Call and Call to Order

2. [Any prior agenda items]

3. The executive director's employment, evaluation, reassignment, duties, discipline, or dismissal; complaints or charges against the executive director

4. [Any further agenda items]

5. Adjourn

The [Agency] may meet in Closed Session on any item listed above if authorized by the Texas Open Meetings Act, Tex. Gov't Code Ann. ch. 551.

Figure 33: Sample Posting of Agenda Item to Discuss Legal Matter in a Closed Session

AGENDA

[AGENCY]
BOARD MEETING
[DATE, TIME, PLACE]

The [AGENCY] will convene as posted to consider and take formal action, if necessary, on the following agenda items:

1. Roll Call and Call to Order

2. [Any prior agenda items]

3. *Sirrom v. Board of Nurse Examiners*, Cause No. 12-3456, in the 78th Judicial District Court of Travis County, Texas

4. [Any further agenda items]

5. Adjourn

The [Agency] may meet in Closed Session on any item listed above if authorized by the Texas Open Meetings Act, Tex. Gov't Code Ann. ch. 551.

Figure 34: Sample Certified Agenda of Closed Session

STATE BOARD OF _____

CERTIFIED AGENDA OF CLOSED SESSION

I, _____, THE PRESIDING OFFICER OF THE STATE BOARD OF _____, DO HEREBY CERTIFY THAT THIS DOCUMENT ACCURATELY REFLECTS ALL SUBJECTS CONSIDERED IN A CLOSED SESSION OF THE BOARD ON _____(DATE).

(a) The closed session began with the following announcement by the undersigned: "The State Board of _____ is now in closed session on _____ (date) at_____(time)."

(b) SUBJECT MATTER OF EACH DELIBERATION:

Agenda Item # ____:
[Insert basis for closed session and general description of the deliberation.]

Agenda Item # ____:
[Insert basis for closed session and general description of the deliberation.]

(c) No further action was taken.

(d) The closed session ended with the following announcement by the undersigned:

"This closed session is ended on _____ (date) at _____ (time)."

Signature _____
[Insert Name], Presiding Officer

Figure 35: Response to Request for Public Information, Asking for Clarification

[DATE]

[REQUESTOR] *VIA CM RRR #*_____
[ADDRESS]

Dear [REQUESTOR]:

This letter is in response to your open records request, dated [DATE], to [GOVERNMENTAL BODY], which we received on [DATE].

[IF APPROPRIATE: It is unclear from your request what specific information or documents, you are requesting. EXPLAIN THE PROBLEM YOU ARE HAVING WITH PROCESSING THE REQUEST.]

[IF APPROPRIATE: Additionally, your request appears to be a request for answers to legal or fact questions, rather than a request for specific information or documents. The Texas Public Information Act does not require a governmental body to perform legal research for a requestor or to answer general questions. Attorney General Open Records Decision No. 563 (1990).]

[IF APPROPRIATE, IDENTIFY THE RECORDS THE AGENCY DOES HAVE WHICH MAY CONTAIN INFORMATION RESPONSIVE TO THE REQUEST: The [GOVERNMENTAL BODY] maintains records on [insert subject] or in [specify format or kind of records]; these records may contain the information you are seeking.]

If you are able to clarify or specifically state the documents or information that you are seeking, we will attempt to respond to your request in accordance with the Act. If you have any questions or wish to discuss this matter further, you may contact me at [PHONE NUMBER].

YOUR REQUEST FOR INFORMATION WILL BE CONSIDERED WITHDRAWN IF YOU DO NOT TO RESPOND TO THIS REQUEST FOR CLARIFICATION BY THE 61ST DAY AFTER THE DATE OF THIS LETTER.

Sincerely,

[GOVERNMENTAL BODY'S
PUBLIC INFORMATION COORDINATOR]

Figure 36: Response to Request for Public Information, No Documents Found

[DATE]

[REQUESTOR]
[ADDRESS]

Dear [REQUESTOR]:

This letter is in response to your open records request to [GOVERNMENTAL BODY], in which you request:

[LIST]

The [GOVERNMENTAL BODY] has reviewed its files and has found no documents responsive to your request.

If you have any questions or wish to discuss this matter further, you may contact me at [PHONE NUMBER].

Sincerely,

[GOVERNMENTAL BODY'S
PUBLIC INFORMATION COORDINATOR]

Figure 37: Response to Request for Public Information, Claiming Exceptions

[DATE]

[REQUESTOR]
[ADDRESS]

Dear [REQUESTOR]:

This letter is in response to your open records request, dated [DATE], to [GOVERNMENTAL BODY] which we received on [DATE], and in which you request:

[LIST]

Enclosed is some of the information that is responsive to your request. The [GOVERNMENTAL BODY] believes that the remaining information responsive to your request is excepted from disclosure under the Texas Public Information Act. We wish to withhold this information and have requested an open records decision from the Attorney General about whether the information is within an exception to public disclosure. We will notify you when a decision is issued. A copy of our request for a decision is enclosed. [IF APPROPRIATE: Some of the text in the request has been redacted to maintain the confidentiality of the requested information until a final decision is made.] We will forward any subsequent written communications we may have with the Office of the Attorney General regarding our request.

If you have any questions or wish to discuss this matter further, you may contact me at [PHONE NUMBER].

Sincerely,

[GOVERNMENTAL BODY'S
PUBLIC INFORMATION COORDINATOR]

Figure 38: Response to Request for Public Information, Making Documents Available

[DATE]

[REQUESTOR]
[ADDRESS]

Dear [REQUESTOR]:

This letter is in response to your open records request, dated [DATE] to [GOVERNMENTAL BODY], and in which you request:

[LIST]

The [GOVERNMENTAL BODY] has reviewed its files and has located documents that contain information responsive to your request. You may review these documents at the [GOVERNMENTAL BODY] in [CITY], Texas, or we will provide you with copies. There are [NUMBER] pages contained in the documents you have requested. The cost for copying these documents is 10¢ per page for standard size pages, based on the current [OFFICE OF THE ATTORNEY GENERAL or GOVERNMENTAL BODY'S RULES]. The total amount for copies is [DOLLAR AMOUNT]. Please forward your check to my attention for this amount made payable to [GOVERNMENTAL BODY] should you desire copies to be provided to you.

If you have any questions or wish to inspect the documents, you may contact me at [PHONE NUMBER].

Sincerely,

[GOVERNMENTAL BODY'S
PUBLIC INFORMATION COORDINATOR]

Figure 39: Response to Request for Public Information, No Charge for Copies

[DATE]

[REQUESTOR]
[ADDRESS]

Dear [REQUESTOR]:

This letter is in response to your open records request to [GOVERNMENTAL BODY], in which you request:

[LIST]

The [GOVERNMENTAL BODY] has reviewed its files and has located documents that are responsive to your request. Although the Texas Public Information Act allows a governmental body to charge for copying documents in accordance with Tex. Gov't Code § 552.267, the enclosed copies of documents are being provided to you at no charge.

If you have any questions or wish to discuss this matter further, you may contact me at [PHONE NUMBER].

Sincerely,

[GOVERNMENTAL BODY'S
PUBLIC INFORMATION COORDINATOR]