



THE OFFICE OF THE ATTORNEY GENERAL OF TEXAS

# ADMINISTRATIVE LAW *Handbook* 2018





# ADMINISTRATIVE LAW HANDBOOK

From the Administrative Law Division

2018







**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

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

You each have been charged with an exceptional responsibility to ensure that the needs of Texans are met and that our government operates openly and efficiently. The success of our government depends on your hard work and commitment to adhering to the laws guiding the actions of public officials and government employees in our state.

The Administrative Procedure Act, the Texas Public Information Act and the Texas Open Meetings Act govern our state's administrative law practices and open government laws. Each legislative session, changes are made to these acts to improve efficiencies, address changes in technology, provide greater transparency and encourage public trust by improving accountability measures in Texas government. These changes are reflected in the 2018 *Administrative Law Handbook*, which is one of the tools my office provides to public officials to help them understand the basic protections and requirements of these laws. While the *Handbook* is not a substitute for legal advice, it does explain the fundamental principles behind each statute. The *Handbook* is available online at [https://www.texasattorneygeneral.gov/files/og/admin\\_law\\_handbook\\_2018.pdf](https://www.texasattorneygeneral.gov/files/og/admin_law_handbook_2018.pdf).

More detailed information relating to the aforementioned acts is available at [www.texasattorneygeneral.gov](http://www.texasattorneygeneral.gov). Additionally, the *Handbook* may be accessed freely at <https://www.texasattorneygeneral.gov/agency/civil-and-defense-litigation-divisions>.

A collaborative and participatory government, operating efficiently and openly, embodies the concept of a "government of the people, by the people, [and] for the people." Your dedicated service contributes to the continued success of our state, and I appreciate these efforts on behalf of our fellow Texans.

Best regards,

A handwritten signature in black ink that reads "Ken Paxton".

Ken Paxton  
Attorney General of Texas



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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 a brief discussion of the Public Information Act and the Open Meetings Act.

This *Handbook* is merely a guide; it cannot take the place of effective 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 (OAG) also provides a *Public Information Act Handbook* and an *Open Meetings Act Handbook*. These *Handbooks* are available online at the OAG website: [www.texasattorneygeneral.gov/og/open-government-related-publications](http://www.texasattorneygeneral.gov/og/open-government-related-publications).

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** which provides general legal requirements that agencies must adhere to when adopting rules or conducting contested cases;<sup>1</sup>
- The **Texas Open Meetings Act** which requires that all governmental bodies deliberate in public meetings, unless a closed or executive session is expressly authorized;<sup>2</sup> and
- The **Texas Public Information Act** which specifies that documents or records of a state agency are open, unless an express exception to disclosure applies to a particular record.<sup>3</sup>

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<sup>1</sup> Tex. Gov't Code §§ 2001.001-.902.

<sup>2</sup> Tex. Gov't Code §§ 551.001-.146.

<sup>3</sup> Tex. Gov't Code §§ 552.001-.353.

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 Acts 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.

## **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."<sup>4</sup> 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: (i) implements, interprets, or prescribes law or policy; or (ii) describes the procedure or practice requirements of a state agency."<sup>5</sup> 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.

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<sup>4</sup> Tex. Gov't Code § 2001.003(1).

<sup>5</sup> Tex. Gov't Code § 2001.003(6)(A).

## **The Texas Open Meetings Act**

The Open Meetings Act (OMA), Government Code chapter 551, requires that all governmental bodies, as defined in the OMA, must deliberate or take action on public business and policy in a properly posted open meeting unless a closed meeting or executive session is expressly authorized. A seven-day notice, exclusive of the posting date and the meeting date, must precede all meetings of a governmental body having statewide jurisdiction. The OMA provides that notice of a state agency meeting 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 <https://www.sos.state.tx.us/texreg/index.shtml>

The notice must be specific; i.e., it must reasonably apprise the public of the specific issues to be discussed, even when a closed meeting 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 (PIA), Government Code chapter 552, mandates public access to information that is collected, assembled, or maintained in connection with the transaction of the official business of governmental bodies. Information subject to the PIA includes not only paper documents but also 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, in most cases, it must either provide the information or seek an attorney general decision regarding the applicability of an exception to disclosure.

# 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 “the whole or part of a state agency permit, certificate, approval, registration, or similar form of permission required by law.”<sup>6</sup> The APA refers to adjudicative proceedings as “contested cases.”<sup>7</sup> 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 a state agency after an opportunity for adjudicative hearing.”<sup>8</sup>

The APA is a procedural act and does not grant a substantive right to a contested case.<sup>9</sup> 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.”<sup>10</sup> Therefore, not all agency decisions necessitate compliance with the procedural protections afforded by the APA.<sup>11</sup>

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 a general guide 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 deny a license, revoke an existing license, or discipline 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 **Figure 1: Complaint Form** and **Figure 2: 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.

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<sup>6</sup> Tex. Gov’t Code § 2001.003(2).

<sup>7</sup> Tex. Gov’t Code § 2001.003(1).

<sup>8</sup> Tex. Gov’t Code § 2001.003(1).

<sup>9</sup> *Tex. Dep’t of Ins. v. State Farm Lloyds*, 260 S.W.3d 233, 243-44 (Tex. App.—Austin 2008, no pet.).

<sup>10</sup> *H. Tebbs, Inc. v. Silver Eagle Distributions, Inc.*, 797 S.W.2d 80, 85 (Tex. App.—Austin 1990, writ denied).

<sup>11</sup> *Best & Co. v. Tex. State Bd. of Plumbing Exam’rs*, 927 S.W.2d 306, 309 (Tex. App.—Austin 1996, writ denied).

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.**] An agency will ordinarily also provide a licensee with a copy of any complaint 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 official notice of hearing. An agency may also request information from third parties during an 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.<sup>12</sup> 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 as to one of the complaints, but not the other.<sup>13</sup> In finding no due process violation, the court noted that the doctor had “contemporaneous notice” of one patient’s complaint, because the patient confronted him during an office visit, wrote him a letter that resulted in a phone conversation regarding the incident, and also filed a written complaint with the county medical society shortly after the touching occurred.<sup>14</sup> 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.<sup>15</sup>

## The Licensee’s Opportunity to Respond

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

**A revocation, suspension, annulment, or withdrawal of a 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.**<sup>16</sup>

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<sup>12</sup> See, e.g., Texas Appraiser Licensing and Certification Board Rule 153.20(f). 22 Tex. Admin. Code § 153.20(f) (four-year limitation on prosecution).

<sup>13</sup> *Granek v. Tex. Bd. of Med. Exam’rs*, 172 S.W. 3d 761, 774-77 (Tex. App.—Austin 2005, no pet.).

<sup>14</sup> *Id.* at 775.

<sup>15</sup> *Id.*

<sup>16</sup> Tex. Gov’t Code § 2001.054(c) (emphasis added).

The minimum legal requirements for notice and opportunity to show compliance are met by the agency's formal notice of hearing to the licensee.<sup>17</sup> 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 may hold informal conferences to provide licensees the opportunity to respond to complaints in person after 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 an informal conference and disposition. **[See Figure 5: Informal Conference Procedures.]** The APA expressly allows a contested matter to be resolved informally.<sup>18</sup> **[See Figure 6: Offer of Informal Conference.]** Agencies frequently include 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.<sup>19</sup> For example, a licensee might agree to a suspension or an 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 request that the licensee voluntarily surrender the license. **[See Figure 11: Proposed Voluntary Surrender of License Cover Letter; Figure 12: Affidavit -**

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<sup>17</sup> *Guerrero-Ramirez v. Tex. State Bd. of Med. Exam'rs*, 867 S.W.2d 911, 917-18 (Tex. App.—Austin 1993, no writ).

<sup>18</sup> Tex. Gov't Code § 2001.056.

<sup>19</sup> Tex. Gov't Code § 2001.056(2).

## **Voluntary Surrender of License; Figure 13: Final Order - Revocation on Voluntary Surrender of License.]**

### **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.<sup>20</sup> Most of the hearings it conducts are governed by the APA, SOAH rules of procedure,<sup>21</sup> and applicable statutes, rules, and written policies of the referring agency.<sup>22</sup>

SOAH was originally created to serve agencies that did not employ a person whose only duty was to preside as a hearing officer over matters related to contested cases before state agencies. Certain other agencies not required by statute to use SOAH have contracted with it to have their hearings conducted by SOAH's administrative law judges (ALJs). SOAH has also been given additional jurisdiction to conduct hearings for other agencies since its creation.<sup>23</sup>

SOAH currently conducts hearings for approximately 60 state agencies, including the Public Utility Commission of Texas, Texas Commission on Environmental Quality, Texas Department of Insurance, Employees Retirement System of Texas, Texas Alcoholic Beverage Commission, Texas Medical Board, Texas Department of Agriculture, Division of Workers' Compensation 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 SOAH is to ensure that contested case hearings 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.<sup>24</sup> 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.

SOAH acquires jurisdiction over a case when a referring agency completes and files a Request to Docket Case form.<sup>25</sup> If the agency wishes to set a hearing, it usually seeks a specific date or range of dates for the hearing. 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

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<sup>20</sup> Tex. Gov't Code § 2003.021.

<sup>21</sup> Tex. Gov't Code § 2003.050; *see* 1 Tex. Admin. Code §§ 155.1-.507.

<sup>22</sup> Tex. Gov't Code §§ 2003.050(b), 2001.058(c).

<sup>23</sup> A contract between SOAH and the agency may be required. *See* Tex. Gov't Code § 2003.024.

<sup>24</sup> Tex. Gov't Code § 2001.061.

<sup>25</sup> 1 Tex. Admin. Code § 155.51(a).

agency is required to issue the Notice of Hearing to the parties. Agencies must comply with SOAH's filing requirements.<sup>26</sup>

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 disputes. More complex cases are usually referred to 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 SOAH (and the referring agency, if the rules for that agency so provide), and served on all parties.<sup>27</sup> Service should be made and response time allowed before a ruling is expected.

An ALJ has the authority on their own motion or on motion of a party, after notice and hearing, to impose sanctions in certain instances.<sup>28</sup> Sanctions can be imposed for discovery abuses, pleading abuses, and failure to obey certain ALJ orders.<sup>29</sup>

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.<sup>30</sup> For these agencies, the ALJ is required to render a decision within 60 days after the later of the date of the close of the hearing or deadline for filing briefs or other post-hearing documents ordered by the ALJ.<sup>31</sup> The decision deadline may be extended only with the consent of all parties.<sup>32</sup>

For other agencies as well as occupational licensing agencies that retain the power to render the final decision and refer the matter to SOAH, the ALJ issues a written Proposal for Decision for consideration by the referring agency.<sup>33</sup> The ALJ issues a Proposal for Decision after hearing the evidence and final oral or written arguments by the parties.

The Licensing and Enforcement Team of SOAH conducts contested cases involving agency actions against licensees including proposed suspension or revocation of a license or seeking administrative penalties. Agencies that refer these cases include the Medical Board, State Board

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<sup>26</sup> 1 Tex. Admin. Code § 155.101.

<sup>27</sup> 1 Tex. Admin. Code §§ 155.305(a).

<sup>28</sup> Tex. Gov't Code § 2003.0421(a); 1 Tex. Admin. Code § 155.157(a).

<sup>29</sup> Tex. Gov't Code § 2003.0421(a); 1 Tex. Admin. Code § 155.157(a).

<sup>30</sup> Tex. Gov't Code § 2001.058(f).

<sup>31</sup> Tex. Gov't Code § 2001.058(f)(1).

<sup>32</sup> *Id.*

<sup>33</sup> Tex. Gov't Code §§ 2001.062, 2003.051.

for Educator Certification, Department of Licensing and Regulation, Racing Commission, and Board of Dental Examiners to name a few.<sup>34</sup>

The Tax Team of SOAH adjudicates cases referred by the Comptroller, which include, tax protest hearings, property value study hearings, and hearings concerning amusement machine civil penalties.<sup>35</sup>

The Utilities Team of SOAH conducts hearings for the Public Utility Commission of Texas (PUC). These hearings include electric rate cases, designating a telecommunication provider as an eligible telecommunication carrier under the Federal Telecommunications Act, applications for certificates of convenience and necessity for electric transmission lines, 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.<sup>36</sup>

The Natural Resources Team of SOAH conducts contested case hearings for the Texas Commission on Environmental Quality (TCEQ). TCEQ regulates municipal and industrial solid waste disposal, hazardous waste activities, air quality, water quality, water rights, and water well drilling activities throughout Texas. 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 TCEQ by SOAH are generally governed by TCEQ's Procedural Rules and by SOAH's rules. The Natural Resource Team may also hear cases referred by the Animal Health Commission, Department of Agriculture, Edwards Aquifer Authority, and the Parks and Wildlife Department.<sup>37</sup>

The Administrative License Revocation (ALR) and Field Enforcement Team of SOAH holds driver's license hearings under the Administrative License Revocation program; Department of Family and Protective Services central registry placement and child care license cases; and Texas Alcoholic Beverage Commission beer and liquor license contested cases, among others. These hearings are conducted all over the state, not just in Austin.<sup>38</sup>

The Alternative Dispute Resolution (ADR) Team of SOAH handles cases in which an agency seeks to reach a mediated resolution to an enforcement case.<sup>39</sup> The ADR Team resolves nursing home enforcement cases brought by the Department of Aging and Disability Services through

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<sup>34</sup> See [www.soah.state.tx.us/about-us/SOAH-teams.asp](http://www.soah.state.tx.us/about-us/SOAH-teams.asp).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

binding arbitration. It also resolves contract claims brought against state agencies, including universities pursuant to chapter 2260 of the Texas Government Code.<sup>40</sup>

The Economic Team of SOAH handles cases in which the agency has appeals concerning benefits by state employees, municipal employees, teachers, and emergency services personnel.<sup>41</sup> It handles disciplinary proceedings against insurance agents, hearings related to highways and motor vehicles, and child support enforcement cases referred by the Office of the Attorney General's Child Support Division to name a few.<sup>42</sup>

## 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.<sup>43</sup> [See **Figure 14: Notice of Hearing**; **Figure 15: 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) either:**
  - (A) a short, plain statement of the factual matters asserted; or**
  - (B) an attachment that incorporates by reference the factual matters asserted in the complaint or petition filed with the state agency.<sup>44</sup>**

The notice of hearing must include the requirements of 1 Texas Administrative Code § 155.401(a). It must include a specific citation to Chapter 155 of the State Office of Administrative Hearing rules, unless the applicable law provides otherwise. The notice of hearing must include the following in 12-point, bold-face type:

Parties that are not represented by an attorney may obtain information regarding contested case hearings on the public website of the State Office of Administrative Hearings at [www.soah.texas.gov](http://www.soah.texas.gov), or in printed format upon request to SOAH.

In accordance with 1 Texas Administrative Code § 155.501, the notice of hearing must also include in “at least 12-point, bold-face type that the factual allegations listed in the notice could be deemed

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> 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.

<sup>44</sup> Tex. Gov't Code § 2001.052(a).

admitted and that the relief sought in the notice of hearing might be granted by default against the party that fails to appear at the hearing.”

The agency must inform the licensee of the specific facts or conduct that caused the agency to take action against the licensee.<sup>45</sup> 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.<sup>46</sup> The agency should cite to each statute and rule that it alleges the licensee violated in order to provide the licensee both reasonable notice and the due process of law guaranteed by the state and federal constitutions.<sup>47</sup> The agency should state the issues of fact and law that will control the result to be reached by the agency.<sup>48</sup>

The APA allows for a party to request that the agency provide a more definite and detailed statement of the facts.<sup>49</sup> 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.<sup>50</sup> The time limits shall be computed using calendar days rather than business days.<sup>51</sup> If the time limit is five days or less, however, the intervening Saturdays, Sundays, and legal holidays are not counted.<sup>52</sup> When computing time periods prescribed or allowed under SOAH rules, the day of the act, event, or default from which the designated time period begins to run is not counted, and the last day of the time period is counted, unless it is a day on which SOAH’s offices are closed, in which case the time period will end on the next day SOAH’s offices are open.<sup>53</sup>

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

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<sup>45</sup> *Pretzer v. Motor Vehicle Bd.*, 125 S.W.3d 23, 37-38 (Tex. App.—Austin 2003), *aff’d in part, rev’d in part*, 138 S.W.3d 908 (Tex. 2004) (per curiam).

<sup>46</sup> *Tex. State Bd. of Pharmacy v. Seely*, 764 S.W.2d 806, 813-15 (Tex. App.—Austin 1988, writ denied).

<sup>47</sup> *Madden v. Tex. State Bd. of Chiropractic Exam’rs*, 663 S.W.2d 622, 626-27 (Tex. App.—Austin 1983, writ ref’d n.r.e.).

<sup>48</sup> *Seely*, 764 S.W.2d at 814.

<sup>49</sup> Tex. Gov’t Code § 2001.052(b).

<sup>50</sup> Tex. Gov’t Code § 2001.051.

<sup>51</sup> 1 Tex. Admin. Code § 155.7(c).

<sup>52</sup> 1 Tex. Admin. Code § 155.7(d).

<sup>53</sup> 1 Tex. Admin. Code § 155.7(b).

fairness.<sup>54</sup> 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 hearing officer's discretion.<sup>55</sup>

## Discovery in Contested Cases

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.<sup>56</sup>

The APA provides for discovery once the Notice of Hearing has been issued.<sup>57</sup> Under SOAH rules, discovery is available once SOAH acquires jurisdiction (when an agency files a Request to Docket Case form).<sup>58</sup> The discovery period ends ten days before the hearing on the merits begins, unless otherwise ordered by the judge or agreed to by the parties.<sup>59</sup>

The APA and SOAH rules provide parties with a broad range of discovery tools. First, 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.<sup>60</sup> The subpoena is to ensure 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 SOAH rules specify otherwise, the state agency issues the subpoena, not the SOAH ALJ.<sup>61</sup>

Parties may also take the deposition of a witness.<sup>62</sup> The state agency, and not the SOAH ALJ, may issue a commission to take a deposition upon the motion of any party to a contested case.<sup>63</sup> **[See Figure 16: Commission for Deposition.]** The APA specifies the format for the commission.<sup>64</sup> Both parties and non-parties may be deposed upon the issuance of a commission. However, fees must be paid to depose non-parties.<sup>65</sup> The issuance of a commission is a ministerial task; an agency has virtually no discretion not to issue a properly filed commission.<sup>66</sup> If the agency objects to the

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<sup>54</sup> *Gibraltar Sav. Ass'n v. Franklin Sav. Ass'n*, 617 S.W.2d 322, 328 (Tex. App.—Austin 1981, writ ref'd n.r.e.).

<sup>55</sup> *State v. Crank*, 666 S.W.2d 91, 94 (Tex. 1984) (citing *Hernandez v. Heldenfels*, 374 S.W.2d 196, 202 (Tex. 1963)).

<sup>56</sup> Tex. Gov't Code § 2001.091(a); 1 Tex. Admin. Code §§ 155.3(g), .251(c).

<sup>57</sup> Tex. Gov't Code § 2001.091-103.

<sup>58</sup> 1 Tex. Admin. Code §§ 155.51(d), .251(a).

<sup>59</sup> 1 Tex. Admin. Code § 155.251(b).

<sup>60</sup> Tex. Gov't Code § 2001.089; 1 Tex. Admin. Code § 155.257.

<sup>61</sup> Tex. Gov't Code § 2001.089; 1 Tex. Admin. Code § 155.257.

<sup>62</sup> 1 Tex. Admin. Code § 155.253.

<sup>63</sup> Tex. Gov't Code § 2001.094.

<sup>64</sup> *Id.*

<sup>65</sup> Tex. Gov't Code § 2001.103.

<sup>66</sup> Tex. Gov't Code § 2001.094(a).

taking of a deposition, the attorney representing the agency in the case may file a motion for protection with the ALJ.<sup>67</sup> Depositions may be used in the contested case hearing.<sup>68</sup>

The third type of discovery authorized by the APA is written discovery.<sup>69</sup> Unless otherwise ordered by the judge, parties can use the forms of written discovery provided by the Texas Rules of Civil Procedure, with certain modifications.<sup>70</sup> Under SOAH rules, each party may serve no more than 25: (1) written requests for production; (2) interrogatories; and (3) requests for admissions.<sup>71</sup> Requests for admissions may be used only to address jurisdictional facts or the genuineness of any documents served with the request.<sup>72</sup> Written discovery must be served at least 30 days before the end of the discovery period.<sup>73</sup> Unless otherwise ordered by the judge or agreed to by the parties, responses to written discovery must be made within 30 days after receipt.<sup>74</sup> Responses and documents produced in discovery shall be served upon the requesting party, and notice of service shall be given to all parties.<sup>75</sup>

A person from whom discovery is sought may file a motion, within the time permitted for a response to a request, for an order protecting the person from the discovery sought.<sup>76</sup> A person alleging failure to comply with discovery must file a motion to compel as soon as practicable.<sup>77</sup>

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.<sup>78</sup> A state agency may also order a party to produce and permit the party making the motion or a person on behalf of that party to inspect and to copy or photograph a document, paper, book, account, letter, photograph, or thing in the party's possession, custody, or control so long as it leads to or is reasonably calculated to lead to the discovery of relevant evidence and is not privileged.<sup>79</sup>

Finally, a person (party or non-party) may obtain an order compelling a party to disclose a previously made statement.<sup>80</sup> The APA also allows parties to discover documents that may name possible parties, witnesses, and reports made by experts.<sup>81</sup>

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<sup>67</sup> 1 Tex. Admin. Code § 155.259(b).

<sup>68</sup> Tex. Gov't Code § 2001.102.

<sup>69</sup> 1 Tex. Admin. Code § 155.255.

<sup>70</sup> 1 Tex. Admin. Code § 155.255.

<sup>71</sup> 1 Tex. Admin. Code § 155.255 (a)(1-3).

<sup>72</sup> 1 Tex. Admin. Code § 155.255(a)(3).

<sup>73</sup> 1 Tex. Admin. Code § 155.255(b).

<sup>74</sup> 1 Tex. Admin. Code § 155.255(c).

<sup>75</sup> 1 Tex. Admin. Code § 155.255(c)(1).

<sup>76</sup> 1 Tex. Admin. Code § 155.259(b).

<sup>77</sup> 1 Tex. Admin. Code § 155.259(c).

<sup>78</sup> Tex. Gov't Code § 2001.091.

<sup>79</sup> *Id.*

<sup>80</sup> Tex. Gov't Code § 2001.093.

<sup>81</sup> Tex. Gov't Code § 2001.092.

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.<sup>82</sup> 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.<sup>83</sup>

## 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.<sup>84</sup> The agency must prove its compliance not only with the APA, but also with any additional requirements of 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. Though parties should use certified mail whenever possible, SOAH rules set out acceptable methods of service and presumptions of receipt.<sup>85</sup> SOAH rules also set out specific requirements for the filing of documents and maintenance of pleadings on the SOAH Case Information System.<sup>86</sup>

In determining which party bears the burden of proof, the judge shall first consider the applicable statute, the agency's rules, and the referring agency's policy and then consider additional factors such as the party seeking affirmative relief.<sup>87</sup> 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.<sup>88</sup> The agency need not prove its case "beyond a reasonable doubt," the standard in criminal cases.<sup>89</sup> Parties have the right to be represented by an attorney if they so choose.<sup>90</sup> A party may also represent himself or herself or appear by an authorized representative.<sup>91</sup>

If a state agency with the burden of proof decides to rely on a section of a statute or rule not previously referenced in the notice of hearing, that state agency must amend the notice, or the complaint or petition, if applicable, to refer to the section of the statute or rule.<sup>92</sup> The agency must amend the notice not later than the seventh day before the hearing.<sup>93</sup> A state agency can still file an amendment during the contested case hearing provided the opposing party is granted a

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<sup>82</sup> Tex. Gov't Code § 2001.083.

<sup>83</sup> Tex. Gov't Code § 552.005(b).

<sup>84</sup> *Tunnell v. Tex. Real Estate Comm'n*, 761 S.W.2d 123, 124-25 (Tex. App.—Dallas 1988, no writ).

<sup>85</sup> 1 Tex. Admin. Code § 155.105(a)(1).

<sup>86</sup> 1 Tex. Admin. Code § 155.101.

<sup>87</sup> 1 Tex. Admin. Code § 155.427.

<sup>88</sup> *Beaver Express Serv., Inc. v. R.R. Comm'n*, 727 S.W.2d 768, 775 n.3 (Tex. App.—Austin 1987, writ denied).

<sup>89</sup> *Tex. State Bd. of Dental Exam'rs v. Sizemore*, 759 S.W.2d 114, 116-17 (Tex. 1988).

<sup>90</sup> Tex. Gov't Code § 2001.053.

<sup>91</sup> 1 Tex. Admin. Code § 155.201.

<sup>92</sup> Tex. Gov't Code § 2001.052(b).

<sup>93</sup> *Id.*

continuance of a least seven days to prepare its case on request of the opposing party.<sup>94</sup> Failure to refer to the particular sections of a statute or rule or to amend the notice when they rely on a section that was not previously in the notice, constitutes prejudice to the substantial rights of the appellant in a suit for judicial review of a final decision or state agency order in a contested case unless the court finds that failure did not unfairly surprise and prejudice the appellant or that the appellant waived the appellant's rights.<sup>95</sup>

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 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.<sup>96</sup>

## **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 recommend to the referring agency the entry of a default judgment. A default judgment will be considered when the moving party can prove that proper notice of the hearing under the APA and the SOAH rules was either received by the defaulting party or sent by first class or certified mail to the party's last known address as shown by the referring agency's records, and the referring agency's statute or rules authorize service of the notice of hearing by sending it to the party's last known address.<sup>97</sup> SOAH requires that the notice include a disclosure in at least 12-point bold type that if a party fails to appear the factual allegations in the notice may be deemed admitted as true and the relief sought may be granted by default.<sup>98</sup> SOAH rules also require that the notice contain a statement that unrepresented parties may obtain information regarding contested cases on SOAH's website.<sup>99</sup> **[See Figure 14: Notice of Hearing.]**

On making a finding that a party to a contested case has defaulted under the rules of SOAH, the ALJ may dismiss the case from the SOAH docket and remand it to the referring agency for informal disposition.<sup>100</sup> Once the case is dismissed and remanded, the state agency may informally dispose of the case by applying its own rules or SOAH's procedural rules relating to default proceedings. However, this does not apply to contested cases in which the ALJ is authorized to render a final decision.

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<sup>94</sup> 1 Tex. Admin. Code § 155.301(b)(1).

<sup>95</sup> Tex. Gov't Code § 2001.052(c).

<sup>96</sup> Tex. Gov't Code § 2001.054(b).

<sup>97</sup> 1 Tex. Admin. Code § 155.501(b)(3).

<sup>98</sup> 1 Tex. Admin. Code § 155.501(b).

<sup>99</sup> 1 Tex. Admin. Code § 155.401(a).

<sup>100</sup> Tex. Gov't Code § 2001.058(d-1).

## Evidence

All parties in a contested case are entitled to an opportunity to present and respond to evidence and argument.<sup>101</sup> The ALJ's decision is based on the facts proven through evidence admitted at the administrative hearing.<sup>102</sup> 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 17: 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.<sup>103</sup> The professional staff of a state agency may provide this testimony. Generally, board members should not participate as witnesses in the hearing.<sup>104</sup> The ALJ resolves objections about whether any particular evidence is admissible.

## Ex Parte Communication

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.<sup>105</sup>

**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 a representative of those entities, except on notice and opportunity for each party to participate.<sup>106</sup>**

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

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<sup>101</sup> Tex. Gov't Code § 2001.051(2).

<sup>102</sup> *R.R. Comm'n v. Lone Star Gas Co.*, 611 S.W.2d 908, 911 (Tex. Civ. App.—Austin 1981, writ ref'd n.r.e.).

<sup>103</sup> *Simmons v. Briggs Equip. Trust*, 221 S.W.3d 109, 114 (Tex. App.—Houston [1st Dist.] 2006, no pet.) (citing *Hager v. Rominies*, 913 S.W.2d 733, 734-35 (Tex. App.—Fort Worth 1995, no writ.)).

<sup>104</sup> *Rogers v. Tex. Optometry Bd.*, 609 S.W.2d 248, 250 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.).

<sup>105</sup> *Acker v. Tex. Water Comm'n*, 790 S.W.2d 299, 301 (Tex. 1990).

<sup>106</sup> Tex. Gov't Code § 2001.061(a).

record by limiting communications with decision-makers outside that record.<sup>107</sup> It is imperative, therefore, that no person, including the licensee or agency staff, contact the SOAH ALJ or board members who will be making the decision in a contested case.<sup>108</sup>

## **Findings of Fact and Conclusions of Law**

The APA provides that a decision or order of a state agency that may become final and is adverse to any party in a contested case be in writing and signed by a person authorized by the agency to sign the agency decision or order. It must include findings of fact and conclusions of law, separately stated.<sup>109</sup>

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 ensures that parties who may be adversely affected by an action are apprised 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.<sup>110</sup> 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.<sup>111</sup>

Findings of fact must be based only on record evidence or matters officially noticed.<sup>112</sup> Certain enabling statutes set forth criteria that must be met before the agency can take action in particular instances. These criteria must be reflected in findings of fact and conclusions of law.<sup>113</sup>

## **Proposal for Decision**

Following the close of the record, the ALJ will prepare a Proposal for Decision (PFD). In a contested case not heard by the SOAH, the agency's hearing examiner will usually issue a PFD. A PFD must be issued if the state agency officials who are to render a final decision have not heard the case or read the hearing record and the decision is adverse to a party other than the agency.<sup>114</sup>

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<sup>107</sup> *Cty. of Galveston v. Tex. Dep't of Health*, 724 S.W.2d 115, 119-24 (Tex. App.—Austin 1987, writ ref'd n.r.e.).

<sup>108</sup> See Tex. Gov't Code § 2003.0412 (extending ex parte communication prohibition to SOAH matters).

<sup>109</sup> Tex. Gov't Code § 2001.141.

<sup>110</sup> *Tex. Health Facilities Comm'n v. Charter Med.-Dall., Inc.*, 665 S.W.2d 446, 452 (Tex. 1984).

<sup>111</sup> *Id.*; see also *Tex. Health Facilities Comm'n v. Presbyterian Hosp. N.*, 690 S.W.2d 564, 567 (Tex. 1985).

<sup>112</sup> Tex. Gov't Code § 2001.141(c).

<sup>113</sup> *Prof'l Mobile Home Transp. v. R.R. Comm'n*, 733 S.W.2d 892, 897 (Tex. App.—Austin 1987, writ ref'd n.r.e.); *Tex. Health Facilities Comm'n v. Charter Med.-Dall., Inc.*, 665 S.W.2d 446, 452 (Tex. 1984).

<sup>114</sup> Tex. Gov't Code § 2001.062.

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.<sup>115</sup> The PFD must be prepared by the individual who conducted the hearing or one who has read the record.<sup>116</sup>

After the PFD has been served on all parties, the parties may file exceptions to the PFD and replies to exceptions to the PFD.<sup>117</sup> The ALJ may amend the PFD in response to exceptions and replies to the exceptions.<sup>118</sup> 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 when applicable, the sanction to be imposed. At the meeting, the board may invite the ALJ to present the final PFD to the governing body of the agency. For samples of PFDs, go to SOAH PFD Search at <http://www.soah.texas.gov/PFDSearch/Search.asp>.

### **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.<sup>119</sup> 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.<sup>120</sup>

A state agency is not prevented from rejecting an ALJ's recommended sanction, but it does need to adhere to § 2001.058(e) of the APA and explain why the agency chooses not to follow the recommendation if it is set out as a conclusion of law.<sup>121</sup> 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.<sup>122</sup> The agency is the decision-maker concerning sanctions for violations of the law or its rules. For this reason, agencies may impose a sanction not recommended by the ALJ. 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

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<sup>115</sup> Tex. Gov't Code § 2001.062(c).

<sup>116</sup> *Id.*

<sup>117</sup> See Tex. Gov't Code § 2001.062(d); 1 Tex. Admin. Code § 155.507.

<sup>118</sup> Tex. Gov't Code § 2001.062(d); 1 Tex. Admin. Code § 155.507.

<sup>119</sup> Tex. Gov't Code § 2001.058(e); see also F. Scott McCown & Monica Leo, *When Can an Agency Change the Findings or Conclusions of an Administrative Law Judge, Part Two*, 51 Baylor L. Rev. 63 (1999); *When Can an Agency Change the Findings or Conclusions of an Administrative Law Judge*, 50 Baylor L. Rev. 65 (1998).

<sup>120</sup> *Tex. State Bd. of Dental Exam'rs v. Brown*, 281 S.W.3d 692, 701-04 (Tex. App.—Corpus Christi 2009, pet. denied).

<sup>121</sup> *Brown*, 281 S.W.3d at 697-98.

<sup>122</sup> *Id.*; *Froemming v. Tex. State Bd. of Dental Exam'rs*, 380 S.W.3d 787, 791-92 (Tex. App.—Austin 2012, no pet.); *Fay-Ray Corp. v. Tex. Alcoholic Beverage Comm'n*, 959 S.W.2d 362, 369 (Tex. App.—Austin 1998, no pet.) (“[A]n agency has broad discretion in determining which sanction best serves the statutory policies committed to the agency’s oversight.” “An agency’s decision in determining an appropriate penalty will not be reversed unless an abuse of discretion is shown.”); *Firemen’s & Policemen’s Civil Serv. Comm’n v. Brinkmeyer*, 662 S.W.2d 953, 956 (Tex. 1984) (“The propriety of a particular disciplinary measure . . . is a matter of internal administration with which the courts should not interfere . . .”).

of fact and conclusions of law.<sup>123</sup> 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.<sup>124</sup> An agency should also ensure that the penalty is assessed in accordance with its own statutes and rules, including an applicable penalty matrix.<sup>125</sup>

## Final Order or Decision

A decision or order in a contested case is final:

- (1) if a motion for rehearing is not filed on time, on the expiration of the period for filing a motion for rehearing;
- (2) if a motion for rehearing is timely filed, on the date:
  - (A) the order overruling the latest filed motion for rehearing is signed; or
  - (B) the latest filed motion for rehearing is overruled by operation of law;
- (3) if a state agency finds that an imminent peril to the public health, safety, or welfare requires immediate effect of a decision or order, on the date the decision or order is signed, **provided that the agency incorporates in the decision or order a factual and legal basis establishing an imminent peril to the public health, safety, or welfare**; or
- (4) on:
  - (A) the date specified in the decision or order for a case in which all parties agree to the specified date in writing or on the record; or
  - (B) if the agreed specified date is before the date the decision or order is signed, the date the decision or order is signed.<sup>126</sup>

If a decision or order is final based on an imminent peril to the public health, safety or welfare, the agency must recite in the decision or order that it is final and effective on the date signed.<sup>127</sup>

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<sup>123</sup> *Granek v. Tex. State Bd. of Med. Exam'rs*, 172 S.W.3d 761, 781 (Tex. App.—Austin 2005, no pet.); *Grotti v. Tex. State Bd. of Med. Exam'rs*, No. 03-04-00612-CV, 2005 WL 2464417, at \*9 (Tex. App.—Austin Oct. 6, 2005, no pet.) (mem. op.).

<sup>124</sup> Tex. Gov't Code § 2001.058(f).

<sup>125</sup> A number of the foregoing provisions no longer apply to the Texas Medical Board. The 82nd Legislature (Regular Session 2011) amended the Texas Medical Practice Act to provide that the board may not change a finding of fact or conclusion of law or vacate an order of an ALJ. However, the board may itself obtain judicial review of any finding or conclusion. The amendments also provide that the board has the sole authority and discretion to determine the appropriate action or sanction and that the ALJ may not make any recommendation regarding the appropriate action or sanction. Tex. Occ. Code § 164.007(a-1).

<sup>126</sup> Tex. Gov't Code § 2001.144(a).

<sup>127</sup> Tex. Gov't Code § 2001.144(b).

The final order or decision of a state agency rendered in a contested case must be in writing and signed by a person authorized by the agency to sign the agency decision or order.<sup>128</sup> It is good practice, however, to have all board members voting in favor of the order to sign it. The final order or decision must contain findings of fact and conclusions of law, separately stated.<sup>129</sup> 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 18: Final Order.]** All parties to a contested case must be notified of the final order or decision, either:

1. personal service;
2. if agreed to by the party to be notified, service by electronic means sent to the current email address or facsimile number of the party's attorney of record or of the party if the party is not represented by counsel;
3. service by first class, certified, or registered mail sent to the last known address of the party's attorney of record or of the party if the party is not represented by counsel; or
4. service by a method required under the state agency's rules or orders for a party to serve copies of pleadings in contested cases.<sup>130</sup>

## **Motion for Rehearing and Judicial Review of Contested Cases**

The APA 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.**<sup>131</sup>

A party who wishes to challenge a final decision must first file a motion for rehearing with the agency,<sup>132</sup> which the agency may grant or deny. **[See Figure 19: Receipt of Motion for Rehearing and Figure 20: Board Action on Motion for Rehearing.]** A party may file a motion for rehearing no later than the 25th day from the date the agency's decision or order is signed.<sup>133</sup> The moving party must send copies of the motion to all other parties using the notification methods specified by Tex. Gov't Code § 2001.142(a). However, the time for filing a motion for rehearing

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<sup>128</sup> Tex. Gov't Code § 2001.141(a).

<sup>129</sup> Tex. Gov't Code § 2001.141(b).

<sup>130</sup> Tex. Gov't Code § 2001.142(a).

<sup>131</sup> Tex. Gov't Code § 2001.171.

<sup>132</sup> Tex. Gov't Code § 2001.145.

<sup>133</sup> Tex. Gov't Code § 2001.146(a).

or reply to a motion for rehearing may be extended by written order by the agency on the motion of a party or on its own motion, but not beyond 100 days from the date the decision or order is signed.<sup>134</sup> Another way to extend the date a motion for rehearing can be filed is by agreement of the parties and approved by the state agency.<sup>135</sup>

Also, the time for filing a motion for rehearing can be extended if an adversely affected party or his or her attorney of record fails to acquire knowledge of a signed decision, such as when the party or the attorney does not receive the required notice of the signed decision or order or acquires knowledge of a signed decision or order before the 15th day after the date the decision or order is signed.<sup>136</sup> If this occurs, a specified or agreed-to revised period begins on the date the adverse party or the adverse party's attorney of record receives the notice or acquires actual knowledge of the signed decision or order, whichever occurs first.<sup>137</sup> The period may not begin earlier than the 15th day or later than the 45th day after the date the decision or order was signed.<sup>138</sup>

In order for the deadline to file a motion for rehearing to be extended, “the adversely affected party must prove, on sworn motion and notice, that (1) the date the party or the party's attorney of record received notice from the state agency or acquired knowledge of the signed decision or order was after the 14th day after the date the decision or order was signed; (2) the adversely affected party exercised due diligence by keeping the state agency and all other parties to the contested case apprised of the current mailing address and any electronic contact information for the adversely affected party or the adversely affected party's attorney of record; and (3) the adversely affected party and the party's attorney of record did not take any action that impeded or prevented receipt of notice of the signing of the decision or order.”<sup>139</sup> The date specified in the sworn motion is considered to be the date decision or order was signed for the movant.<sup>140</sup> The state agency or a person authorized to act for the agency must grant or deny the sworn motion not later than the date of the agency's governing board's next meeting or, for an agency without a governing board, not later than the 10th day after the date the agency receives the sworn motion.<sup>141</sup> If the agency or a person authorized to act for the agency fails to grant or deny the motion at the next meeting or before the 10th day after the date the agency receives the motion, then the motion is considered granted.<sup>142</sup> The timely filing of a sworn motion for rehearing extends the period for agency action on any motion for rehearing until the 100th day after the date the decision or order subject to the motion for rehearing is signed.<sup>143</sup>

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<sup>134</sup> Tex. Gov't Code § 2001.146(e).

<sup>135</sup> Tex. Gov't Code § 2001.146(a); *see also* Tex. Gov't Code § 2001.147.

<sup>136</sup> Tex. Gov't Code § 2001.142(c).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> Tex. Gov't Code § 2001.142(d).

<sup>140</sup> Tex. Gov't Code § 2001.142(g).

<sup>141</sup> Tex. Gov't Code § 2001.142(e).

<sup>142</sup> Tex. Gov't Code § 2001.142(f).

<sup>143</sup> Tex. Gov't Code § 2001.142(g).

A motion for rehearing must identify with particularity findings of fact or conclusions of law that are the subject of the complaint and any evidentiary or legal ruling claimed to be erroneous.<sup>144</sup> Also, the motion must state the legal and factual basis for the claimed error.<sup>145</sup>

A reply to a motion for rehearing, if any, must be filed not later than the 40th day after the date the decision or order that is the subject of the motion is signed, or not later than the 10th day after the date a motion for rehearing is filed if the time for filing the motion for rehearing has been extended due to: (1) lack of timely notice of the decision or order, (2) by agreement of the parties, or (3) by written order of the agency.<sup>146</sup>

The time limits and other requirements for filing a subsequent motion for rehearing, a reply to the subsequent motion, and a ruling on the subsequent motion, are governed by Tex. Gov't Code §§ 2001.142, .144, .145, .146, and .147.<sup>147</sup> However, a subsequent motion for rehearing is not required after a state agency rules on a motion for rehearing unless the order disposing the motion modifies the state agency's decision or order, other than typographical, grammatical, or clerical changes; or vacates the decision or order and provides for a new decision.<sup>148</sup>

If the agency signs an order ruling on a motion for rehearing, the agency shall deliver or send a copy of the order to each party the same way they would send them a signed order in a contested case.<sup>149</sup> Unless acted on by the agency, the motion for rehearing is overruled by operation of law on the 55th day after the date the decision or order is signed.<sup>150</sup> If the time to file the motion for rehearing was extended, then the motion for rehearing is overruled by operation of law on the date fixed by the order, or in the absences of a fixed date, the 100th day after the date of the signed decision or order.<sup>151</sup> An agency is not required to notify a party that the motion for rehearing has been overruled by operation of law. Lack of notice that a decision is overruled by operation of law does not toll the deadline for filing an appeal.<sup>152</sup> An agency has no power to act on a motion for rehearing that has been overruled by operation of law.<sup>153</sup>

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.<sup>154</sup> An agency's

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<sup>144</sup> Tex. Gov't Code § 2001.146(g).

<sup>145</sup> *Id.*

<sup>146</sup> Tex. Gov't Code § 2001.146(b); *see also* Tex. Gov't Code §§ 2001.142, .146(e), .147.

<sup>147</sup> Tex. Gov't Code § 2001.146(i); *see also* Tex. Gov't Code §§ 2001.142, .144, .145, .146, .147.

<sup>148</sup> Tex. Gov't Code § 2001.146(h).

<sup>149</sup> Tex. Gov't Code § 2001.142(b).

<sup>150</sup> Tex. Gov't Code § 2001.146(c).

<sup>151</sup> Tex. Gov't Code § 2001.146(f).

<sup>152</sup> *Hernandez v. Tex. Dep't of Ins.*, 923 S.W.2d 192 (Tex. App.—Austin 1996, no writ).

<sup>153</sup> *Jones v. State Bd. of Educator Certification*, 315 S.W.3d 237 (Tex. App.—Austin 2010, pet. denied).

<sup>154</sup> *Young Trucking, Inc. v. R.R. Comm'n*, 781 S.W.2d 719, 721 (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.).

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.<sup>155</sup>

An appealing party has 30 days from the date the decision or order is final and appealable to file a lawsuit in district court to review the agency's decision.<sup>156</sup> The procedural prerequisites to an appeal of a final order are mandatory and jurisdictional; they cannot be waived and must be strictly followed.<sup>157</sup> 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.<sup>158</sup>

As mentioned before, “[a] motion for rehearing must identify with particularity findings of fact or conclusions of law that are the subject of the complaint and any evidentiary or legal ruling claimed to be erroneous.”<sup>159</sup> Also, it must state the legal and factual basis for the claimed error.<sup>160</sup> A motion for rehearing can be “so indefinite, vague and general as to constitute no motion for rehearing at all.”<sup>161</sup> 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. In most cases where the appealing party has filed any motion for rehearing, the court will find jurisdiction and then reach the question whether the motion preserves the issues raised on appeal. If an appealing party files suit for judicial review before the motion for rehearing is overruled, the petition for judicial review will be effective and considered filed on the date the last timely motion for rehearing is overruled and after the motion is overruled.<sup>162</sup>

Absent specific legislative authority, there is no inherent right to judicial review unless an agency's decision adversely affects a constitutional right.<sup>163</sup> The APA grants a right to judicial review, and an agency's enabling statute may also expressly provide a right of judicial review.<sup>164</sup>

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

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<sup>155</sup> *R.D. Oil Co. v. R.R. Comm'n*, 849 S.W.2d 871, 875 (Tex. App.—Austin 1993, no writ.); *Tex. State Bd. of Dental Exam'rs v. Silagi*, 766 S.W.2d 280, 285 (Tex. App.—El Paso 1989, writ denied).

<sup>156</sup> Tex. Gov't Code §§ 2001.144, .176.

<sup>157</sup> Tex. Gov't Code § 311.034; *Prairie View A&M Univ. v. Chatha*, 381 S.W.3d 500, 514-15 (Tex. 2012).

<sup>158</sup> *Hill v. Bd. of Trs. of the Ret. Sys. of Tex.*, 40 S.W.3d 676, 678 (Tex. App.—Austin 2001, no pet.); *Burke v. Cent. Educ. Agency*, 725 S.W.2d 393, 397 (Tex. App.—Austin 1987, writ ref'd n.r.e.).

<sup>159</sup> Tex. Gov't Code § 2001.146(g).

<sup>160</sup> Tex. Gov't Code § 2001.146(g); see also *Suburban Util. Corp. v. Pub. Util. Comm'n*, 652 S.W.2d 358, 365 (Tex. 1983); *Hamamcy v. Tex. State Bd. of Med. Exam'rs*, 900 S.W.2d 423, 425 (Tex. App.—Austin 1995, writ denied) (citing *Burke*, 725 S.W.2d at 397).

<sup>161</sup> *Hamamcy*, 900 S.W.2d 423, 425 (citing *Testoni v. Blue Cross & Blue Shield of Tex., Inc.*, 861 S.W.2d 387, 391 (Tex. App.—Austin 1992, no writ), overruled on other grounds by *Montgomery v. Blue Cross & Blue Shield of Tex., Inc.*, 925 S.W.2d 147 (Tex. App.—Austin 1996, writ denied)); *Burke*, 725 S.W.2d at 397.

<sup>162</sup> Tex. Gov't Code § 2001.176.

<sup>163</sup> *Cont'l Cas. Ins. Co. v. Functional Restoration Assocs.*, 19 S.W.3d 393, 404 (Tex. 2000); *Burkhalter v. Tex. State Bd. of Med. Exam'rs*, 918 S.W.2d 1, 3 (Tex. App.—Austin 1996, no writ).

<sup>164</sup> Tex. Gov't Code § 2001.171; *Tex. Dep't of Protective & Regulatory Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 197 (Tex. 2004).

from the district court.<sup>165</sup> In order for a transfer to be granted, the district court must find that the public interest requires a prompt, authoritative ruling on the legal issues and that the case ordinarily would be appealed.<sup>166</sup> Both courts must concur in the transfer.<sup>167</sup> 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.<sup>168</sup>

Additionally, except for instances where additional evidence is presented in district court, an agency may not modify its findings or decision in a contested case after proceedings for judicial review have been instituted and while the case is under judicial review.<sup>169</sup>

## **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.<sup>170</sup> In de novo review, the reviewing court tries all issues of fact and law as if the agency had not acted.<sup>171</sup> 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.<sup>172</sup>

In a substantial evidence appeal, the reviewing court may affirm the final order in whole or in part. The reviewing court shall 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**

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<sup>165</sup> Tex. Gov't Code § 2001.176(c).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> Tex. Gov't Code § 2001.1775; *Dass v. Tex. Bd. of Prof'l Eng'rs*, 517 S.W.3d 252, 255-56 (Tex. App.—Austin 2017, no pet.).

<sup>170</sup> *Dotson v. Tex. State Bd. of Med. Exam'rs*, 612 S.W.2d 921, 922 (Tex. 1981); *Tex. State Bd. of Dental Exam'rs v. Sizemore*, 759 S.W.2d 114, 116 (Tex. 1988).

<sup>171</sup> Tex. Gov't Code § 2001.173; *PR Invs. & Specialty Retailers, Inc. v. State*, 251 S.W.3d 472, 476 (Tex. 2008).

<sup>172</sup> Tex. Gov't Code § 2001.174.

**(F) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.**<sup>173</sup>

Substantial evidence review requires that the agency transmit an original or certified copy of the administrative record to the reviewing court.<sup>174</sup> [See **Figure 21: 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.<sup>175</sup> The record filed with the clerk of the court may be shortened by agreement.<sup>176</sup>

Under the substantial evidence standard of review, the court may not hear new evidence, except in the most limited circumstance.<sup>177</sup> The appealing party has the burden of proof to demonstrate invalidity of the final order or an absence of substantial evidence.<sup>178</sup> The court, therefore, must presume that the agency's final order is valid and supported by substantial evidence.<sup>179</sup> However, if an agency in a suit for judicial review of a final decision or order of a state agency brought by a license holder fails to give proper notice of the facts or conduct alleged to support the agency's intended action, and fails to give the license holder an opportunity to show compliance with all requirements of the law for the retention of the license, prejudice to the license holder's substantial rights is presumed unless the court finds that failure did not unfairly surprise and prejudice the license holder or that the license holder waived the opportunity to show compliance of the law for retention of the license.<sup>180</sup>

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.<sup>181</sup> The reviewing court will essentially decide the case anew by hearing evidence from all parties.<sup>182</sup>

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<sup>173</sup> Tex. Gov't Code § 2001.174(2).

<sup>174</sup> Tex. Gov't Code § 2001.175(b).

<sup>175</sup> Tex. Gov't Code § 2001.060.

<sup>176</sup> Tex. Gov't Code § 2001.175(b).

<sup>177</sup> Tex. Gov't Code § 2001.175(c), (e).

<sup>178</sup> *Vandygriff v. First Sav. & Loan Ass'n of Borger*, 617 S.W.2d 669, 673 (Tex. 1981) (citing *Citizens of Tex. Sav. & Loan Ass'n v. Lewis*, 483 S.W.2d 359, 366 (Tex. Civ. App.—Austin 1972, writ ref'd n. r. e.)).

<sup>179</sup> *State v. Pub. Util. Comm'n*, 883 S.W.2d 190, 204 (Tex. 1994) (citing *Tex. Health Facilities Comm'n v. Charter Med.—Dall., Inc.*, 665 S.W.2d 446, 452 (Tex 1984)).

<sup>180</sup> Tex. Gov't Code § 2001.054(c), (e).

<sup>181</sup> Tex. Gov't Code § 2001.173.

<sup>182</sup> *Commercial Life Ins. Co. v. Tex. State Bd. of Ins.*, 808 S.W.2d 552, 554 n.3 (Tex. App.—Austin 1991, writ denied).

Suits for review under the substantial evidence rule do not affect the enforcement of an agency's final order.<sup>183</sup> 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.<sup>184</sup> 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.<sup>185</sup>

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<sup>183</sup> Tex. Gov't Code § 2001.176(b)(3); *Tex. State Bd. of Pharmacy v. Seely*, 764 S.W.2d 806, 815 (Tex. App.—Austin 1988, writ denied).

<sup>184</sup> Generally, the district court will grant a temporary injunction to enjoin the effect of the final order entered by the agency in a 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. *Transp. Co. of Tex. v. Robertson Transps., 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).

<sup>185</sup> Tex. Gov't Code § 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:	RESPONDENT INFORMATION:
_____	_____
Name	Name of individual or firm complained
_____	_____
Address	Address
_____	_____
City, State, and Zip Code	City, State, and Zip Code
_____	_____
Home	Telephone
_____	
Business 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	Date

## Figure 2: Acknowledgement 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 Tex. Admin. Code §§ 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.  
CMRRR 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] Monday-Friday 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

BI: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 Tex. Admin. Code §§ 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.  
CMRRR No.

**Figure 7: Allegations**

**EXHIBIT A — ALLEGATIONS**

On or about November 10, 2015, Dr. Joe Sphinx, D.H., License No. XXXXXXXX, agreed to perform a hieroglyphic examination and to treat hieroglyphic writings on the building of the Woeisme Company. Section XIX.xx(1) and (2) of the Hieroglyphic Act and Board rule, IXX Tex. Admin. Code § 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 using such course of action, Dr. Sphinx has violated the above cited provisions of the Hieroglyphic Act and Board rule.

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 § XIX.xx(10) of the Hieroglyphic Act and Board rule, IXX Tex. Admin. Code § iv.v.

**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  
CMRRR 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 Tex. Admin. Code §§ 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 thirty (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.  
CMRRR No.

**Figure 10: Agreed Final Order**

TBHE Docket No.		
IN THE MATTER	§	BEFORE THE TEXAS BOARD
OF	§	OF
JOE SPHINX, D.H.	§	HIEROGLYPHIC EXAMINERS
LICENSE NO. XXXXXXXXXXXX.	§	

AGREED FINAL  
ORDER

On this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, the Texas Board of Hieroglyphic Examiners considered the matter of the license of JOE SPHINX, D.H., Respondent.

This Agreed Final 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 Tex. Admin. Code §§ 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 § XIX.xx(1) and (2) of the Hieroglyphic Act and Board rule, IXX Tex. Admin. Code § iv.v. Moreover, when asked about these allegations, Dr. Sphinx was silent and refused to answer the Board's inquiry in violation of § XIX.xx(10) of the Hieroglyphic Act and Board rule, IXX Tex. Admin. Code § iv.x.
4. The Enforcement Committee of the Board held an informal conference on \_\_\_\_\_, 20\_\_\_\_, 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 Tex. Admin. Code §§ 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 Tex. Admin. Code §§ 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: Agreed Final 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 downtime (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: \_\_\_\_\_, 20\_\_\_\_.

STATE OF TEXAS §  
 COUNTY OF \_\_\_\_\_ §

\_\_\_\_\_  
 JOE SPHINX, D.H.  
 [INSERT ADDRESS]

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 \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
 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, \_\_ Tex. Admin. Code §§ \_\_ 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 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 \_\_\_\_\_, 20\_\_.

By:

\_\_\_\_\_  
[EXECUTIVE DIRECTOR]  
Executive Director

**Figure 14: Notice of Hearing**

[AGENCY]	§	
	§	
v.	§	Docket No. _____
	§	
[LICENSE/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 is 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 the authority of [AGENCY ENABLING STATUTE] and the Administrative Procedure Act, Texas Government 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.

**PARTIES THAT ARE NOT REPRESENTED BY AN ATTORNEY MAY OBTAIN INFORMATION REGARDING CONTESTED CASE HEARINGS ON THE PUBLIC WEBSITE OF THE STATE OFFICE OF ADMINISTRATIVE HEARINGS AT [www.soah.texas.gov](http://www.soah.texas.gov), OR IN PRINTED FORMAT UPON REQUEST TO SOAH**

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.**

/s/ [EXECUTIVE DIRECTOR] \_\_\_\_\_  
Executive Director  
[AGENCY]

**Figure 15: 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 Tex. Admin. Code §§ 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 Tex. Admin. Code § 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, 2015, Dr. Joe Sphinx, D.H. agreed to perform a hieroglyphic examination and to treat hieroglyphic writings on the building of the Woeisme Company. Section XIX.xx(1) and (2) of the Hieroglyphic Act and Board rule, IXX Tex. Admin. Code § 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 using 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 § XIX.xx(10) of the Hieroglyphic Act and Board rule, IXX Tex. Admin. Code § iv.x.

Respondent’s conduct constitutes grounds for disciplinary action by the Board pursuant to § 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: 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 \_\_\_\_\_, 20\_\_\_, 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 \_\_\_\_\_, 20\_\_\_, Austin, Travis County, Texas, under authority of Texas Government Code ch. 2001.

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[EXECUTIVE DIRECTOR]  
Executive Director [AGENCY]

**Figure 17: 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 \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Notary Public

**Figure 18: Final Order**

[AGENCY] v. [LICENSEE]	§ § §	Docket No. _____
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**FINAL ORDER**

Came on for consideration this \_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_, 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: \_\_\_\_\_.


**Figure 19: 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].

If the agency chooses to grant your Motion for Rehearing, it must do so within 55 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  
CMRRR No.

**Figure 20: 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 55 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  
CMRRR No.

**Figure 21: Affidavit Certifying Administrative Record**

[AGENCY] §  
v. § STATE OF TEXAS  
[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 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.<sup>186</sup>**

Frequently, before a lawsuit is filed, the agency or the attorney general will send the offending party a Cease and Desist Order. [See **Figure 22: 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.

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

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<sup>186</sup> Tex. Gov't Code § 2001.202(a).

agency shows that a statute is being violated.<sup>187</sup> Suits for injunctive relief will often include a request for civil penalties and attorney's fees when authorized by an agency's enabling statute.<sup>188</sup> If an individual violates the injunction, the agency may seek to have the individual held in civil or criminal contempt.

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<sup>187</sup> *Roth v. Montemayor*, 50 S.W.3d 54, 61 (Tex. App.—Austin 2001, no pet.); *State v. Tex. Pet Foods, Inc.*, 591 S.W.2d 800, 804 (Tex. 1979); *Gulf Holding Corp. v. Brazoria Cty.*, 497 S.W.2d 614, 619 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ ref'd n.r.e.) (citing *Ralph Williams Gulfgate Chrysler Plymouth, Inc. v. State*, 466 S.W.2d 639 (Tex. Civ. App.—Houston [14th Dist.] 1971, writ ref'd n.r.e.)); *Priest v. Tex. Animal Health Comm'n*, 780 S.W.2d 874, 876 (Tex. App.—Dallas 1989, no writ) (citing *City of Hous. v. Mem'l Bend Util. Co.*, 331 S.W.2d 418, 422 (Tex. Civ. App.—Houston 1960, writ ref'd n.r.e.)).

<sup>188</sup> Tex. Gov't Code § 402.006(c); *see also State v. Triax Oil & Gas, Inc.*, 966 S.W.2d 123, 127 (Tex. App.—Austin 1998, no pet.).

**Figure 22: 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 \_\_\_\_\_, 20\_\_.

By:  
\_\_\_\_\_  
[AGENCY CONTACT]

SWORN TO AND SUBSCRIBED before me, the undersigned authority, on this the \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Notary Public

# 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.”<sup>189</sup> The definition specifically excludes statements governing purely internal agency management or organization. Over the 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.<sup>190</sup> The merits of the ruling were not reached in that particular court case. However, not every statement or policy established by an agency is a rule.

In 2008, the Texas Supreme Court concluded that an agency’s application of certain claim calculations was in conflict with the agency’s published rules, and therefore the new calculation was invalidated for violating the APA. The Court held the agency’s interpretation was invalid, because it was not adopted as a rule even though it met the APA’s definition of a rule.<sup>191</sup> In 2009, a court of appeals invalidated an agency’s letter setting out a new interpretation of statute.<sup>192</sup> In that case, the court held that because the agency intended to enforce the new interpretation in the regulated community, it was a rule that should have been adopted pursuant to the notice and comment provisions of the APA. State agencies should consult with legal counsel and carefully review whether their statements and other actions might trigger the APA rulemaking requirements. While there are a number of cases holding that an agency engaged in illegal ad hoc rulemaking, there are also many cases holding that an agency’s statement is not a rule.

The following are examples of agency statements that the courts have decided are not rules under the APA: a penalty matrix used by agency staff to recommend sanctions that would be assessed by the agency’s commission;<sup>193</sup> advisory letters to members of the regulated community about whether electronic machines were illegal gambling devices;<sup>194</sup> an agency decision in a contested case;<sup>195</sup> notices that simply restated published rules;<sup>196</sup> statements or applications of law that are

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<sup>189</sup> Tex. Gov’t Code § 2001.003(6).

<sup>190</sup> *Tex. Alcoholic Beverage Comm’n v. Amusement & Music Operators of Tex., Inc.*, 997 S.W.2d 651 (Tex. App.—Austin 1999, pet. dismissed w.o.j.).

<sup>191</sup> *El Paso Hosp. Dist. v. Tex. Health & Human Servs. Comm’n*, 247 S.W.3d 709, 714-15 (Tex. 2008).

<sup>192</sup> *Combs v. Entm’t Publ’ns, Inc.*, 292 S.W.3d 712 (Tex. App.—Austin 2009, no pet.).

<sup>193</sup> *Tex. Educ. Agency v. Leeper*, 893 S.W.2d 432, 442-43 (Tex. 1994).

<sup>194</sup> *Brinkley v. Tex. Lottery Comm’n*, 986 S.W.2d 764 (Tex. App.—Austin 1999, no pet.).

<sup>195</sup> *R.R. Comm’n v. WBD Oil & Gas Co.*, 104 S.W.3d 69 (Tex. 2003).

<sup>196</sup> *LMV-AL Ventures, LLC v. Tex. Dep’t of Aging & Disability Servs.*, 520 S.W.3d 113 (Tex. App.—Austin 2017, pet. filed); *Tex. Dep’t of Transp. v. Sunset Transp., Inc.*, 357 S.W.3d 691, 704 (Tex. App.—Austin 2011, no pet.).

restatements of a statute,<sup>197</sup> and internal policies establishing the appearance of certain driver's licenses.<sup>198</sup>

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.

## Sources of Rules

Agencies are required to adopt rules of practice setting forth the nature and requirements of all available formal and informal procedures.<sup>199</sup> 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.<sup>200</sup> 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.<sup>201</sup>

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.”<sup>202</sup> 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.<sup>203</sup>

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<sup>197</sup> *Tex. Alcoholic Beverage Comm'n v. D. Hous., Inc.*, No. 03-13-000327-CV, 2017 WL 2333272, at \*3 (Tex. App.—Austin May 25, 2017, pet. filed) (mem. op.).

<sup>198</sup> *Tex. Dep't of Pub. Safety v. Salazar*, 304 S.W.3d 896, 903-05 (Tex. App.—Austin 2009, no pet.).

<sup>199</sup> Tex. Gov't Code § 2001.004(1).

<sup>200</sup> Tex. Gov't Code § 2110.005.

<sup>201</sup> Tex. Gov't Code § 2001.006(d).

<sup>202</sup> Tex. Gov't Code § 2001.039(e).

<sup>203</sup> Tex. Gov't Code § 2001.031(b).

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.<sup>204</sup> An “interested person” must be:

1. A resident of the State of Texas;
2. A business entity located in the State of Texas;
3. A governmental subdivision located in the State of Texas; or
4. A public or private organization located in the State of Texas that is not a state agency.<sup>205</sup>

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.<sup>206</sup> There is no right under the APA for a person to seek judicial review from an agency’s denial of a petition for rulemaking or based on an agency’s failure to adopt a rule.<sup>207</sup> Similarly, the court has held that the APA does not create a right to judicial review of an agency’s failure to grant a public hearing pursuant to APA § 2001.029 when the agency denies a petition for rulemaking.<sup>208</sup>

## Negotiated Rulemaking

Negotiated rulemaking has been defined in several different ways including:

**A consensus-based process in which a proposed rule is initially developed by a committee composed of representatives of all those interests that will be affected by the rule, including those interests represented by the rulemaking agency.**

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.<sup>209</sup> The Act requires the appointment of a “convenor” to assist the agency

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<sup>204</sup> Tex. Gov’t Code § 2001.021(a).

<sup>205</sup> Tex. Gov’t Code § 2001.021(d).

<sup>206</sup> Tex. Gov’t Code § 2001.021(c).

<sup>207</sup> *Tex. Comm’n on Env’tl Qual. v. Bonser-Lain*, 438 S.W.3d 887 (Tex. App.—Austin 2014, no pet.).

<sup>208</sup> *Kidd v. Tex. Pub. Util. Comm’n*, 481 S.W.3d 388, 394 (Tex. App.—Austin 2015, no pet.).

<sup>209</sup> Tex. Gov’t Code § 2008.002.

in its determination of whether or not to proceed with negotiated rulemaking.<sup>210</sup> The “convenor” must follow specific guidelines set out in the Act.<sup>211</sup>

Upon deciding to proceed with negotiated rulemaking, an agency is required to publish a “notice of intent” both in the *Texas Register* and “in appropriate media.”<sup>212</sup> 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.**<sup>213</sup>

The agency is required to consider the comments received and appoint a Negotiated Rulemaking Committee to serve until the proposed rule is adopted.<sup>214</sup> Similarly, the agency is required to appoint a Negotiated Rulemaking Facilitator under the criteria found in the Act.<sup>215</sup> The Facilitator utilizes alternative dispute resolution skills to attempt to arrive at a consensus on a proposed rule.<sup>216</sup> 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.<sup>217</sup> 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.<sup>218</sup> Finally, the rule must be proposed under the regular APA procedures.<sup>219</sup>

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<sup>210</sup> Tex. Gov’t Code § 2008.052(a).

<sup>211</sup> Tex. Gov’t Code § 2008.052.

<sup>212</sup> Tex. Gov’t Code § 2008.053(a).

<sup>213</sup> *Id.*

<sup>214</sup> Tex. Gov’t Code § 2008.054.

<sup>215</sup> Tex. Gov’t Code § 2008.055.

<sup>216</sup> Tex. Gov’t Code § 2008.056(a)(2).

<sup>217</sup> Tex. Gov’t Code § 2008.056(d).

<sup>218</sup> Tex. Gov’t Code § 2008.053(b).

<sup>219</sup> Tex. Gov’t Code § 2008.058.

## Texas Register and Texas Administrative Code

The *Texas Register* (*Register*) is an official publication of the State of Texas, published by the Texas Register Section 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."<sup>220</sup> It is published weekly on Fridays and contains notices of proposed rules, proposed rule reviews, 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.<sup>221</sup>

The Texas Administrative Code (TAC), published by the Secretary of State, contains all agency rules, other than emergency rules. 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.<sup>222</sup> The TAC as published on the Secretary of State website is current each day. Consult the Texas Register for pending and emergency rules.<sup>223</sup>

### 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 of the Office of the Secretary of State has rules and policies pertaining to the submission and formatting of documents for publication in the *Register*.<sup>224</sup> Agencies should access these rules and the Liaison Center from the Texas Register website <http://www.sos.state.tx.us/texreg/liaisons.shtml> to ensure compliance with submission procedures.<sup>225</sup> An agency must designate at least one individual to act as liaison between that agency and the staff of the Texas Register Section.<sup>226</sup>

The notice of a proposed rule must be published a minimum of 30 days in advance of the intended adoption date of the rule.<sup>227</sup> The notice requirement in the APA gives the public advance notice

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<sup>220</sup> Tex. Gov't Code § 2002.002.

<sup>221</sup> Tex. Gov't Code § 2002.011.

<sup>222</sup> Tex. Gov't Code § 2002.054.

<sup>223</sup> The *Texas Register* (<http://www.sos.state.tx.us/texreg/index.shtml>) and the Texas Administrative Code (<http://www.sos.state.tx.us/tac/index.shtml>) are available on the Internet.

<sup>224</sup> 1 Tex. Admin. Code §§ 91.1-.74.

<sup>225</sup> The Texas Register Liaison Center is available by password to designated agency liaisons.

<sup>226</sup> Tex. Gov't Code § 2002.021.

<sup>227</sup> Tex. Gov't Code § 2001.023(a).

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,<sup>228</sup> the APA specifically provides that notice of a proposed rule is not effective until published in the *Register*.<sup>229</sup> 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.<sup>230</sup> The secretary of state shall provide an electronic notification of rulemaking filings by a state agency upon receiving written request from the lieutenant governor, a member of the legislature, or a legislative agency.<sup>231</sup> On a majority vote of members of a standing committee of the legislature, a committee may send to a state agency a statement supporting or opposing adoption of the proposed rule.<sup>232</sup> Additionally, the Commission on Jail Standards and the Commission on Law Enforcement must provide law enforcement agencies with notice of the adoption of rules that affect those agencies before their rules are effective.<sup>233</sup> Beginning on September 1, 2017, an agency that adopts a rule that may have an adverse impact on a rural community is required, if feasible, to send notice of the proposed rule to each member of the legislature who represents a rural community that may be adversely impacted by the rule.<sup>234</sup>

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.<sup>235</sup> If such a possibility exists, the agency must prepare a local employment impact statement.<sup>236</sup>

## 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.<sup>237</sup> Further, certain major environmental rules require a regulatory analysis and a draft impact analysis for the rules to be valid.<sup>238</sup> In drafting the notice of a proposed rule, an agency should refer to the

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<sup>228</sup> Tex. Gov't Code § 2001.023(b).

<sup>229</sup> Tex. Gov't Code § 2001.025.

<sup>230</sup> Tex. Gov't Code § 2001.026.

<sup>231</sup> Tex. Gov't Code § 2001.032(b).

<sup>232</sup> Tex. Gov't Code § 2001.032(c).

<sup>233</sup> Tex. Gov't Code § 2001.028.

<sup>234</sup> Act of May 19, 2017, 85th Leg., R.S., H.B. 3433, § 3 (to be codified as an amendment to Tex. Gov't Code § 2006.002(d)(2)).

<sup>235</sup> Tex. Gov't Code § 2001.022(a).

<sup>236</sup> *Id.*

<sup>237</sup> Tex. Gov't Code § 2001.024.

<sup>238</sup> Tex. Gov't Code § 2001.0225.

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 prepared in a manner to indicate any words to be added or deleted from the current text;<sup>239</sup>**
- 3. a statement of statutory or other 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.<sup>240</sup>**

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 agency 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. Also, the agency must 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.<sup>241</sup>

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 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

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<sup>239</sup> See Tex. Gov't Code § 2002.014 (allows Secretary of State to omit certain information).

<sup>240</sup> Tex. Gov't Code § 2001.024(a).

<sup>241</sup> Tex. Gov't Code § 2001.024(a)(3)(C).

governments.<sup>242</sup> The *Texas Register Liaison Center* training 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.<sup>243</sup> 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 APA § 2001.024.<sup>244</sup>

The notice of the proposed rule must include a request for comments.<sup>245</sup> 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 email address of the contact person. Also, the agency may 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.<sup>246</sup>

The APA also requires, in the notice of proposed rules, "any other statement required by law."<sup>247</sup> 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.

Chapter 2006 of the Government Code 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 and rural communities.<sup>248</sup> Prior to the 85th Legislature, § 2006.002 required each

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<sup>242</sup> Tex. Gov't Code § 2001.024(a)(4).

<sup>243</sup> Tex. Gov't Code § 2001.024(a)(5); *see also Unified Loans, Inc. v. Pettijohn*, 955 S.W.2d 649, 654 (Tex. App.—Austin 1997, no pet.).

<sup>244</sup> *Pettijohn*, 955 S.W.2d at 654.

<sup>245</sup> Tex. Gov't Code § 2001.024(a)(7).

<sup>246</sup> Tex. Gov't Code § 2001.024(b).

<sup>247</sup> Tex. Gov't Code § 2001.024(a)(8).

<sup>248</sup> *Pettijohn*, 955 S.W.2d at 654.

agency to determine if a rule will have an adverse economic effect on small businesses and micro-businesses. The 85th Legislature, in House Bill 3433, amended chapter 2006 to include a rural communities impact statement.<sup>249</sup> If a rule may have an adverse economic effect on these small businesses or rural communities, 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 and rural communities. Also, a copy of the proposed rule that is submitted to the *Texas Register* must be provided to the Senate and House standing committees that are charged with reviewing the proposed rule.<sup>250</sup> If the proposed rule may have an adverse impact on rural communities, the agency, if feasible, must provide notice to each member of the legislature who represents the potentially impacted rural communities.<sup>251</sup> Guidelines are available to assist state agencies with this requirement. They may be found on the OAG website. Additionally, if an agency is considering a rule that will have an adverse economic impact on small businesses,<sup>252</sup> micro-businesses,<sup>253</sup> or rural communities, 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.<sup>254</sup>

The 85th Legislature adopted new § 2001.0221 to the APA.<sup>255</sup> This section requires that an agency prepare a government growth impact statement in the proposal, pursuant to § 2001.024(a)(8), referenced above. The government growth impact statement requires each agency to specifically assess and address eight questions regarding how the proposed rule may impact various economic measures. A close review of these items shows that most of the requirements should already be substantively addressed in the proposal pursuant to § 2001.024 of the APA. Most of the eight questions require factual knowledge of the proposed rule, though some may necessitate economic analysis.<sup>256</sup> New § 2001.0221 requires the Comptroller to adopt rules to implement the government growth impact statement requirements. The rules are located at 34 Tex. Admin. Code Ch. 11. Regardless of the format that an agency chooses to complete the government growth impact statement—for example as a separate analysis or table within a proposal or just expanding the current proposal to ensure each topic is answered—agency counsel should check each question set out in § 2001.0221 prior to certifying the rule. However, failure to comply with the statement does not impair the legal effect of a rule.<sup>257</sup>

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<sup>249</sup> Act of May 19, 2017, 85th Leg., R.S., H.B. 3433, §§ 1-5 (to be codified as amendments to Tex. Gov't Code §§ 2006.001-.002).

<sup>250</sup> Tex. Gov't Code § 2006.002(d)(1).

<sup>251</sup> Tex. Gov't Code § 2006.002(d)(2).

<sup>252</sup> Tex. Gov't Code § 2006.001(2) (definition of small business).

<sup>253</sup> Tex. Gov't Code § 2006.001(1) (definition of micro-business).

<sup>254</sup> Tex. Gov't Code § 2006.002(a).

<sup>255</sup> Act of May 28, 2017, 85th Leg., R.S., § 2 (to be codified at Tex. Gov't Code § 2001.0221).

<sup>256</sup> See Tex. Gov't Code § 2001.0221(b)(8).

<sup>257</sup> Tex. Gov't Code § 2001.0221(e).

## Filing the Notice

The *Texas Register* requires agency submissions of rules to be either electronically over the web, or by fax.<sup>258</sup> As mentioned before, notice of a proposed rule is effective when published in the Register, not when filed with the Texas Register Section.<sup>259</sup>

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.<sup>260</sup> 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*.<sup>261</sup>

## Comments on Proposed Rules

Agencies must provide all interested persons a reasonable opportunity to submit data, views, or arguments relating to a proposed rule.<sup>262</sup> The public is entitled to have at least 30 days' notice of a proposed rule before the agency adopts the rule.<sup>263</sup> 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.<sup>264</sup>

A public hearing may be held on a proposed rule and must be provided if requested by a governmental subdivision or agency, 25 or more persons, or an association with at least 25 members.<sup>265</sup> 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 23: Agenda for the Public Hearing on a Proposed Rule.]** The public hearing(s) should be conducted during the published comment period to streamline the response to comment process.

A member of the agency staff or board members may conduct 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. Regardless of who conducts the hearing, the purpose

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<sup>258</sup> Tex. Gov't Code § 2002.017; 1 Tex. Admin. Code § 91.35(j).

<sup>259</sup> Tex. Gov't Code § 2001.025; *see also* 1 Tex. Admin. Code § 91.4.

<sup>260</sup> 1 Tex. Admin. Code § 91.5(d).

<sup>261</sup> Tex. Gov't Code § 2001.037.

<sup>262</sup> Tex. Gov't Code § 2001.029(a).

<sup>263</sup> Tex. Gov't Code § 2001.023(a).

<sup>264</sup> Tex. Gov't Code § 2001.029(a).

<sup>265</sup> Tex. Gov't Code § 2001.029(b).

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. The agency is required to respond to all written and oral comments that were received during the comment period in its formal order adopting the rule.<sup>266</sup>

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.<sup>267</sup> 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.<sup>268</sup> 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.<sup>269</sup>

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<sup>266</sup> See Tex. Gov't Code § 2001.033.

<sup>267</sup> Tex. Gov't Code §§ 551.001(2), (4), .041.

<sup>268</sup> Tex. Gov't Code §§ 2001.029(c), .033.

<sup>269</sup> See Tex. Gov't Code § 2001.035; *Tex. Workers' Comp. Comm'n v. Patient Advocates of Tex.*, 136 S.W.3d 643 (Tex. 2004); *State Bd. of Ins. v. Deffebach*, 631 S.W.2d 794 (Tex. App.—Austin 1982, writ ref'd n.r.e.).

## Agency Order Adopting a Rule

The 85th Legislature enacted new APA § 2001.0045, in House Bill 1290. Section 2001.0045 requires a state agency that is subject to the new provisions to repeal a rule that imposes costs on a regulated person, a state agency, a special district, or a local government, before proposing a rule that would increase costs on any of the above listed persons or entities. An agency must reduce a cost that is equal to or greater than the cost imposed by the new rule.<sup>270</sup> The definition of state agency in § 2001.0045 differs from the general APA definition of state agency that is set out in § 2001.003(7). Most notably, the § 2001.0045 definition excludes any agency under the authority of an elected officer of the state. Section 2001.0045 also carves out a host of agencies by name and is inapplicable to a variety of different rulemakings that may otherwise create a fiscal impact. Perhaps the largest exception in § 2001.0045 is found in subsection (c)(9), which excludes a rule “necessary to implement legislation.” An agency should consult with its legal counsel to determine whether and how it must comply with § 2001.0045.

An agency may not adopt a proposed rule sooner than 30 days or later than six months after it is published in the *Register*.<sup>271</sup> A proposed rule is automatically withdrawn six months after its publication in the *Register* if the agency does not publish an order adopting or withdrawing the rule before that time.<sup>272</sup>

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.<sup>273</sup> [See **Figure 24: Sample Preamble and Adopted Rule**; and **Figure 25: Order Adopting a Rule**.] The agency’s justification must explain “how and why it reached the conclusions it did.”<sup>274</sup> The agency must present its justification in a relatively clear, precise, and logical fashion.<sup>275</sup> 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**

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<sup>270</sup> Tex. Gov’t Code § 2001.0045(b)(2).

<sup>271</sup> Tex. Gov’t Code §§ 2001.023, .027.

<sup>272</sup> Tex. Gov’t Code § 2001.027.

<sup>273</sup> Tex. Gov’t Code § 2001.033.

<sup>274</sup> *Nat’l Ass’n of Indep. Insurers v. Tex. Dep’t of Ins.*, 925 S.W.2d 667, 669 (Tex. 1996).

<sup>275</sup> *Id.* at 669; *Lambright v. Tex. Parks & Wildlife Dep’t*, 157 S.W.3d 499, 504-05 (Tex. App.—Austin 2005, no pet.).

### 3. the reasons why the agency disagrees with party submissions and proposals.<sup>276</sup>

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.”<sup>277</sup> The duty to present a reasoned justification exists independently of the duty to include the foregoing three elements in the order.<sup>278</sup>

A state agency “shall consider fully all written and oral submissions.”<sup>279</sup> It is in the reasoned justification of the agency’s order adopting a rule that the agency should summarize the comments it received, 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.”<sup>280</sup>

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.<sup>281</sup>

Also, the order adopting the rule must restate the rule’s statutory authority and how the agency interprets that authority as authorizing or requiring the rule.<sup>282</sup> The agency should explain the nexus between the statutory authority and rule with enough specificity that a reviewing court can understand how the rule falls within the agency’s authority. 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.”<sup>283</sup>

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.<sup>284</sup>

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<sup>276</sup> Tex. Gov’t Code § 2001.033(a)(1).

<sup>277</sup> *Nat’l Ass’n of Indep. Insurers*, 925 S.W.2d at 669 (citing Ronald L. Beal, *Challenging the Factual Basis and Rationality of a Rule Under APTRA*, 45 Baylor L. Rev 1 (1993)).

<sup>278</sup> *Tex. Nat. Res. Conservation Comm’n v. Accord Agric., Inc.*, No. 03-98-00340-CV, 1999 WL 699825, at \*10-12 (Tex. App.—Austin Sept. 10, 1999, no pet.) (not designated for publication); *Nat’l Ass’n of Indep. Insurers*, 925 S.W.2d at 669.

<sup>279</sup> Tex. Gov’t Code § 2001.029(c).

<sup>280</sup> Tex. Gov’t Code § 2001.035(c).

<sup>281</sup> Tex. Gov’t Code § 2001.033(a)(1)(B); *Nat’l Ass’n of Indep. Insurers*, 925 S.W.2d at 669; *Tex. Med. Ass’n v. Tex. Workers’ Comp. Comm’n*, 137 S.W.3d 342, 353 (Tex. App.—Austin 2004, no pet.).

<sup>282</sup> Tex. Gov’t Code § 2001.033(a)(2).

<sup>283</sup> Tex. Gov’t Code § 2001.033(a)(3).

<sup>284</sup> Tex. Gov’t Code § 2001.036.

Section 2001.030 of the APA provides that an agency must state the principal reasons for and against the adoption if requested by an interested party before or within 30 days after the adoption of the rule. The agency must include in the statement its reasons for overruling the considerations against adoption.

## **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.<sup>285</sup> State agency rules are also available online at the Secretary of State's website. <https://www.sos.state.tx.us/tac/index.shtml>.

## **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."<sup>286</sup> 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.<sup>287</sup>

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.<sup>288</sup> An emergency rule is effective immediately on filing with the Texas Register Section.<sup>289</sup>

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.<sup>290</sup>

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<sup>285</sup> Tex. Gov't Code § 2001.007(b).

<sup>286</sup> Tex. Gov't Code § 2001.034(a)(1).

<sup>287</sup> Tex. Gov't Code §§ 551.041, .043-45.

<sup>288</sup> Tex. Gov't Code § 2001.036(b).

<sup>289</sup> Tex. Gov't Code § 2001.036(a)(2).

<sup>290</sup> Tex. Gov't Code § 2001.034.

## Judicial Review of Agency Rules

A declaratory judgment is available to determine the validity or applicability of any agency rules, including emergency rules.<sup>291</sup> 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.”<sup>292</sup> “[T]he remedy . . . is limited to declarations concerning the *rule*—that the rule is null and void, in the case of a validity challenge, or that the rule did not impose a right, duty, or obligation on the plaintiff, in the case of an applicability challenge . . . .”<sup>293</sup> 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.<sup>294</sup> The Third Court of Appeals has held that there is no right to judicial review of a rule that has not been finally adopted, because a proposed rule is not yet a rule. Section 2001.038 only authorizes the courts to review a rule.<sup>295</sup>

Agencies must possess statutory authority to adopt rules and a rule may not exceed that statutory authority.<sup>296</sup> 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 invalid.<sup>297</sup> Generally, an agency rule may not conflict with other statutes either.<sup>298</sup>

An agency rule must comport with constitutional provisions and be adopted in accordance with proper APA procedures.<sup>299</sup> A rule is voidable if it is not adopted in substantial compliance with §§ 2001.0225 through 2001.034 of the APA.<sup>300</sup> 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.”<sup>301</sup> In a procedural challenge, the court’s review is limited to the “four corners” of the order adopting the

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<sup>291</sup> Tex. Gov’t Code § 2001.038(a).

<sup>292</sup> *Id.*

<sup>293</sup> *State v. BP Am. Prod. Co.*, 290 S.W.3d 345, 362 (Tex. App.—Austin 2009, pet. denied).

<sup>294</sup> Tex. Gov’t Code § 2001.038(f).

<sup>295</sup> *Kidd v. Tex. Pub. Util. Comm’n*, 481 S.W.3d 388, 394-95 Tex. App.—Austin 2015, no pet.).

<sup>296</sup> *Pruett v. Harris Cty. Bail Bond Bd.*, 249 S.W.3d 447, 452 (Tex. 2008); *Fulton v. Associated Indem. Corp.*, 46 S.W.3d 364, 369 (Tex. App.—Austin 2001, pet. denied); *State Bd. of Ins. v. Deffebach*, 631 S.W.2d 794, 798 (Tex. App.—Austin 1982, writ ref’d n.r.e.); *see also* Tex. Att’y Gen. Op. Nos. GA-0649 (2008), GA-0020 (2003).

<sup>297</sup> *State v. Pub. Util. Comm’n*, 131 S.W.3d 314, 321 (Tex. App.—Austin 2004, pet. denied).

<sup>298</sup> Tex. Att’y Gen. Op. No. GA-0727 (2009).

<sup>299</sup> *Bullock v. Hewlett-Packard Co.*, 628 S.W.2d 754, 756 (Tex. 1982); *Tex. Liquor Control Bd. v. Attic Club, Inc.*, 457 S.W.2d 41, 45 (Tex. 1970).

<sup>300</sup> Tex. Gov’t Code § 2001.035(a).

<sup>301</sup> Tex. Gov’t Code § 2001.035(d).

rule to determine an agency's substantial compliance with the APA.<sup>302</sup> An action challenging a rule for noncompliance with APA rulemaking requirements must be filed within two years of the effective date of the rule.<sup>303</sup>

“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 so 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.”<sup>304</sup>

In a case that involves only the applicability of a rule, the plaintiff must show why a rule does 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. The Third Court of Appeals has clarified that the court's jurisdiction over an applicability challenge reaches only the question of whether the rule applies to the plaintiff and not how it applies.<sup>305</sup> 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.<sup>306</sup>

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<sup>302</sup> *Tex. Med. Ass'n v. Tex. Workers' Comp. Comm'n*, 137 S.W.3d 342, 353 (Tex. App.—Austin 2004, no pet.) (citing *Reliant Energy, Inc. v. Pub. Util. Comm'n*, 62 S.W.3d 833, 840 (Tex. App.—Austin 2001, no pet.)).

<sup>303</sup> Tex. Gov't Code § 2001.035(b).

<sup>304</sup> Tex. Gov't Code § 2001.040.

<sup>305</sup> *LMV-AL Ventures, LLC v. Tex. Dep't of Aging & Disability Servs.*, 520 S.W.3d 113 (Tex. App.—Austin 2017, pet. filed).

<sup>306</sup> *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 23: 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 24: 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 Tex. Reg. 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 Tex. Reg. 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 25: 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 Tex. Reg. 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.”<sup>307</sup> Moreover, the Legislature has the authority “to create additional causes of action in favor of the State and intrust their prosecution, whether in the trial or in the appellate courts, solely to the Attorney General.”<sup>308</sup>

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, Public Information 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.<sup>309</sup>

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<sup>307</sup> Tex. Const. art. IV, § 22.

<sup>308</sup> Tex. Const. art. IV, § 22; *Maud v. Terrell*, 200 S.W. 375, 376 (Tex. 1918); Tex. Att’y Gen. Op. No. JM-791 (1987).

<sup>309</sup> *Gonzalez v. Avalos*, 866 S.W.2d 346 (Tex. App.—El Paso 1993, writ dismissed w.o.j.); see also *Sonego v. McEwen*, No. 04-95-00920-CV, 1996 WL 525829, at \*2 (Tex. App.—San Antonio Sept. 18, 1996, no writ) (not designated for publication).

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.<sup>310</sup> The doctrine of sovereign immunity protects the state from suit and liability unless immunity is waived.<sup>311</sup>

The legislature has waived the state's immunity in some areas.<sup>312</sup> 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.<sup>313</sup> 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.<sup>314</sup> It is important to note that although the TTCA waives sovereign immunity, it does not waive individual immunities.<sup>315</sup>

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.<sup>316</sup> In addition, a supervisor who violates this statute is liable for a civil penalty of up to \$15,000.<sup>317</sup> 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

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<sup>310</sup> *Cloud v. McKinney*, 228 S.W.3d 326, 333 (Tex. App.—Austin 2007, no pet.).

<sup>311</sup> *Lowe v. Tex. Tech Univ.*, 540 S.W.2d 297, 298 (Tex. 1976).

<sup>312</sup> Tex. Civ. Prac. & Rem. Code §§ 101.001-109 (Texas Tort Claims Act); Tex. Gov't Code §§ 554.001-.010 (Whistleblower Act).

<sup>313</sup> Tex. Civ. Prac. & Rem. Code §§ 101.021, .025.

<sup>314</sup> Tex. Civ. Prac. & Rem. Code § 101.023(a).

<sup>315</sup> Tex. Civ. Prac. & Rem. Code § 101.026.

<sup>316</sup> Tex. Gov't Code § 554.002.

<sup>317</sup> Tex. Gov't Code § 554.008(a).

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.<sup>318</sup> Whether a particular act is covered by official immunity depends on the facts of the individual case.<sup>319</sup> The first element of official immunity is whether the government employee was performing a discretionary duty.<sup>320</sup> Generally, a discretionary duty should not be an 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 reasonably could have believed their conduct to be justified.<sup>321</sup> Finally, the third element requires a government employee to prove that the offending act was taken within the scope of the employee's authority.<sup>322</sup> 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.<sup>323</sup> 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.<sup>324</sup> 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.<sup>325</sup> 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.<sup>326</sup> Also, the state will indemnify eligible persons for damages awarded against them, up to \$10,000 per single occurrence of damage to property.<sup>327</sup> However, the state will not 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.<sup>328</sup> 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

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<sup>318</sup> *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994).

<sup>319</sup> *Kassen v. Hatley*, 887 S.W.2d 4, 12 (Tex. 1994).

<sup>320</sup> *Lancaster*, 883 S.W.2d at 653-55.

<sup>321</sup> *Id.* at 655-57.

<sup>322</sup> *Id.* at 658.

<sup>323</sup> Tex. Civ. Prac. & Rem. Code §§ 104.001-.009.

<sup>324</sup> Tex. Civ. Prac. & Rem. Code § 104.001.

<sup>325</sup> Tex. Civ. Prac. & Rem. Code § 104.002(a).

<sup>326</sup> Tex. Civ. Prac. & Rem. Code § 104.003(a)(1).

<sup>327</sup> Tex. Civ. Prac. & Rem. Code § 104.003(a)(2).

<sup>328</sup> Tex. Civ. Prac. & Rem. Code § 104.009.

in excess of the state’s liability under § 104.003 of the Civil Practice and Remedies Code. 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.<sup>329</sup>

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.<sup>330</sup> This limitation on personal liability does not apply to damages based on the U.S. Constitution or federal laws.

The attorney general represents persons who are eligible for state indemnification.<sup>331</sup> 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.<sup>332</sup> The request for legal representation should include copies of the citation or summons and the petition or complaint. Persons eligible for state indemnification 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.”<sup>333</sup> An opinion is “advice or a judgment or decision and the legal reasons and principles on which it is based.”<sup>334</sup> Requests for opinions must be in writing and should be submitted directly to the Office of the Attorney General, Opinion Committee.<sup>335</sup> A request for an attorney general opinion must come from the head of a state agency, certain elected officials or other statutorily authorized requestors. Generally, the Opinion Committee will provide a formal, published opinion within 180 days after the date the request is received.<sup>336</sup> Questions about specific pending requests should be directed to the assistant attorney general assigned to represent the agency. Formal attorney general opinions may be accessed at the attorney general’s website at [www.texasattorneygeneral.gov](http://www.texasattorneygeneral.gov).

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<sup>329</sup> Tex. Civ. Prac. & Rem. Code § 104.009(b).

<sup>330</sup> Tex. Civ. Prac. & Rem. Code § 108.002.

<sup>331</sup> Tex. Civ. Prac. & Rem. Code § 104.004.

<sup>332</sup> Tex. Civ. Prac. & Rem. Code § 104.005(2).

<sup>333</sup> Tex. Const. art. IV, § 22.

<sup>334</sup> Tex. Gov’t Code § 402.041.

<sup>335</sup> Tex. Gov’t Code § 402.042.

<sup>336</sup> Tex. Gov’t Code § 402.042(c)(2).

## 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 excepted from disclosure under the Public Information Act. The Open Records Division will provide either an open records letter ruling or an 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;**
- **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.<sup>337</sup> 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.

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<sup>337</sup> *Pub. Util. Comm'n v. Cofer*, 754 S.W.2d 121, 123 (Tex. 1988).

## **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, all contracts for outside counsel must be approved by the Office of the Attorney General. Forms to request outside counsel can be found in the publications section of the attorney general's website: [https://www.texasattorneygeneral.gov/age\\_ncy/publications](https://www.texasattorneygeneral.gov/age_ncy/publications).

# The Texas Open Meetings Act

The Texas Open Meetings Act<sup>338</sup> (OMA) provides that meetings of governmental bodies must be open to the public, except for expressly authorized closed meetings or executive sessions. The public must be given notice of the date, hour, place, and subject matter of meetings of governmental bodies.<sup>339</sup> The definitions of “governmental body,” “meeting,” and “deliberation” work together to establish which public bodies are subject to the OMA, and when gatherings of the members of a governmental body must comply with its requirements. The requirement that every meeting of a governmental body must be open to the public presupposes that a meeting is physically accessible to the public.<sup>340</sup> Accordingly, a governmental body may not hold a meeting in a location that does not provide physical accessibility to the public.<sup>341</sup>

Nearly all state agencies are subject to the OMA. 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.”<sup>342</sup> Other governmental bodies subject to the OMA 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.<sup>343</sup> 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.”<sup>344</sup> 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 OMA if it only makes recommendations.<sup>345</sup>

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<sup>338</sup> Tex. Gov’t Code §§ 551.001-.146.

<sup>339</sup> Tex. Gov’t Code § 551.041.

<sup>340</sup> Tex. Att’y Gen. Op. No. JC-0053 (1999).

<sup>341</sup> Tex. Att’y Gen. Op. No. JC-0487 (2002) (UT’s Board of Regents may not hold a meeting in Mexico); Tex. Att’y Gen. Op. 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 OMA).

<sup>342</sup> Tex. Gov’t Code § 551.001(3)(A).

<sup>343</sup> Tex. Gov’t Code §§ 551.001(3)(B)-(L), .0015.

<sup>344</sup> Tex. Gov’t Code § 551.001(3)(D).

<sup>345</sup> 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); Tex. Att’y Gen. Op. No. GA-0361 (2005) (county election commission is not a governmental body under OMA); 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 OMA).

The requirements of the Open Meetings Act apply to a governmental body when it engages in a regular, special, called, or emergency meeting.<sup>346</sup> 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.**<sup>347</sup>

The OMA 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 an issue within the jurisdiction of the governmental body or any public business.**<sup>348</sup>

The courts have construed “verbal exchange” to mean the “reciprocal giving and receiving of spoken words.”<sup>349</sup> 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.<sup>350</sup>

A written exchange of information between members of a governmental body about its public business does not constitute a meeting or deliberation if the writing is posted to an online message board displayed in real time and both viewable and searchable by the public.<sup>351</sup>

A quorum of a governmental body is defined in the OMA as “a majority of the governmental body, unless defined differently by applicable law, rule or the charter of the governmental body.”<sup>352</sup> 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 five members, because a quorum of the members was not involved. The court also found that the OMA was not violated, because there was no evidence that the members were attempting to circumvent the OMA by conducting telephone polling with each other or attempting to avoid meeting in a quorum through use of the telephone.<sup>353</sup>

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<sup>346</sup> Tex. Gov’t Code § 551.002.

<sup>347</sup> Tex. Gov’t Code § 551.001(4)(A).

<sup>348</sup> Tex. Gov’t Code § 551.001(2).

<sup>349</sup> *Gardner v. Herring*, 21 S.W.3d 767, 771 (Tex. App.—Amarillo 2000, no pet.) (citing *Dall. Morning News Co. v. Bd. of Trs. of Dall. Indep. Sch. Dist.*, 861 S.W.2d 532, 537 (Tex. App.—Dallas 1993, writ denied)); *but see* Tex. Att’y Gen. Op. No. JC-0307 (2000).

<sup>350</sup> Tex. Att’y Gen. Op. No. JC-0307 (2000).

<sup>351</sup> Tex. Gov’t Code § 551.006.

<sup>352</sup> Tex. Gov’t Code § 551.001(6).

<sup>353</sup> *Harris Cty. Emergency Serv. Dist. #1 v. Harris Cty. Emergency Corps*, 999 S.W. 2d 163, 169-70 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

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 OMA.<sup>354</sup>

A subcommittee chosen by a governmental body from its membership may also be subject to the OMA 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.<sup>355</sup> 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 OMA.<sup>356</sup> Similarly, a group of district judges who meet to appoint a county auditor or to appoint a community supervision and corrections department director does not constitute a governmental body under the OMA.<sup>357</sup>

Not every gathering of a quorum constitutes a meeting subject to the OMA. 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.<sup>358</sup> Likewise, a quorum of a governmental body may gather at a social function unrelated to the public business of the governmental body, so long as no discussion of public business occurs.<sup>359</sup> 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 OMA's definition.<sup>360</sup> Accordingly, the agency need not post notice of the attendance of a quorum of members of the governmental body at a legislative meeting. The 85th Legislature (Regular Session 2017) amended the OMA to also exclude from the definition of a meeting "the attendance by a quorum of a governmental body at a candidate forum, appearance, or debate to inform the electorate" if formal action is not taken at the forum, appearance, or debate.<sup>361</sup>

Employee or third person briefings, where the governmental body only receives information, or asks or receives questions, are generally 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.<sup>362</sup> A city council or a county commissioners' court may receive

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<sup>354</sup> Tex. Att'y Gen. Op. No. GA-0098 (2003).

<sup>355</sup> *Willmann v. City of San Antonio*, 123 S.W.3d 469 (Tex. App.—San Antonio 2003, pet. denied); Tex. Att'y Gen. Op. No. JM-1072 (1989); *see also* Tex. Att'y Gen. Op. No. JC-0060 (1999); Tex. Att'y Gen. Op. Nos. H-823 (1976), H-238 (1974), H-3 (1973).

<sup>356</sup> Tex. Att'y Gen. Op. No. JC-0160 (1999).

<sup>357</sup> Tex. Att'y Gen. Op. No. KP-0038 (2015).

<sup>358</sup> Tex. Gov't Code § 551.001(4).

<sup>359</sup> *Id.*

<sup>360</sup> Tex. Gov't Code § 551.0035.

<sup>361</sup> Tex. Gov't Code § 551.001(4).

<sup>362</sup> Tex. Gov't Code § 551.001(4)(B).

a report about items of community interest from staff or a member of council or court without prior notice. But no action or discussion about possible action is permitted.<sup>363</sup>

## Notice of Meetings

The OMA requires written notice of all meetings.<sup>364</sup> 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 may be taken on a topic.<sup>365</sup> The word “consideration” alone is sufficient to put the general public on notice that the Commission might act during the meeting.<sup>366</sup> [See Figure 27: Sample Posting for an Open Meeting.] Broad topics such as “personnel matters,” “real estate matters,” “litigation,” “city manager’s report,” “mayor’s update,” or vague descriptions such as “Presentation by Council member Smith,” are to be avoided.<sup>367</sup> Generally, the greater the public interest in a subject, the more specific the posting should be.<sup>368</sup> 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.<sup>369</sup> 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.

The OMA requires a governmental body that holds a meeting by videoconference to post notice advising the public of the particular meeting locations that must be open to the public.<sup>370</sup>

In addition to the substance of the notice, the OMA provides specific rules regarding the time and place for posting notice. These posting requirements are mandatory. Seven days’ notice, exclusive of the posting date and the meeting date, must precede all meetings of a governmental body having statewide jurisdiction.<sup>371</sup> The posting requirements for local governmental bodies vary depending

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<sup>363</sup> Tex. Gov’t Code § 551.0415.

<sup>364</sup> Tex. Gov’t Code § 551.041.

<sup>365</sup> *City of San Antonio v. Fourth Court of Appeals*, 820 S.W.2d 762, 765 (Tex. 1991); *City of San Angelo v. Tex. 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 Auth.*, 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 Enters., Inc. v. Bd. of Trs. of Austin Indep. Sch. Dist.*, 706 S.W.2d 956, 958 (Tex. 1986); Tex. Att’y Gen. Op. No. GA-0511 (2007).

<sup>366</sup> *City of San Angelo*, 92 S.W.3d at 630.

<sup>367</sup> Tex. Att’y Gen. Op. No. GA-0668 (2008).

<sup>368</sup> *City of San Antonio*, 820 S.W.2d at 765; *Cox Enters., Inc.*, 706 S.W.2d at 958-59; *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 Cty. Water Planning P’ship v. Hays Cty., Tex.*, 41 S.W.3d 174 (Tex. App.—Austin 2001, pet. denied); *City of Laredo v. Escamilla*, 219 S.W.3d 14, 19 (Tex. App.—San Antonio 2006, pet. denied).

<sup>369</sup> *River Rd. Neighborhood Ass’n v. S. Tex. Sports*, 720 S.W.2d 551, 557 (Tex. App.—San Antonio 1986, writ dismissed).

<sup>370</sup> Tex. Gov’t Code § 551.127(e).

<sup>371</sup> Tex. Gov’t Code §§ 551.044(a), .048; 1 Tex. Admin. Code § 91.21(a)(1).

on the type of entity.<sup>372</sup> These provisions are quite detailed; therefore, reference to the OMA itself is necessary to ensure compliance. Agencies should also consult the secretary of state's rules governing postings on the *Texas Register* website.<sup>373</sup> The OMA 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.<sup>374</sup>

## 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.<sup>375</sup>**

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.<sup>376</sup> A governmental body may conduct an emergency meeting only when a true emergency exists.<sup>377</sup> A governmental body must adequately identify the nature of the emergency in its notice.<sup>378</sup> 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.<sup>379</sup> The OMA 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.<sup>380</sup>

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<sup>372</sup> Tex. Gov't Code §§ 551.049-.054.

<sup>373</sup> 1 Tex. Admin. Code §§ 91.1-.74.

<sup>374</sup> Tex. Gov't Code § 551.056.

<sup>375</sup> Tex. Gov't Code § 551.045(b).

<sup>376</sup> Tex. Gov't Code § 551.045(a).

<sup>377</sup> *River Rd. 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 Cty. Good Gov't League v. Ramon*, 619 S.W.2d 224, 229 (Tex. Civ. App.—Beaumont 1981, writ ref'd n.r.e.).

<sup>378</sup> *Markowski*, 940 S.W.2d at 724; *Cooksey v. State*, 377 S.W.3d 901 (Tex. App.—Eastland 2012, no pet.).

<sup>379</sup> Tex. Gov't Code § 551.047; *see also* Tex. Gov't Code § 551.052 (notice to news media by school districts).

<sup>380</sup> Tex. Gov't Code § 551.045(e).

## Conducting an Open Meeting

An open meeting may not be convened unless a quorum of the governmental body is present at the meeting. [See **Figure 28: Presiding Officer’s Script for Conducting a Public Meeting.**] The public has an absolute right to attend an open meeting. However, the OMA does not entitle the public to choose the items to be discussed or to speak at the meeting about items on the agenda.<sup>381</sup> 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 OMA.<sup>382</sup> The OMA does permit members of the public to record open meetings by recorder or video camera.<sup>383</sup> 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 generally 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 mic” is sufficient.<sup>384</sup> 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. However, deliberation or a decision on the subject of an inquiry is limited to a proposal to place the subject on a future agenda.<sup>385</sup> A governmental body may continue a meeting from day-to-day without re-posting; but, if a meeting is continued to any day other than the one immediately following, the governmental body must re-post notice.<sup>386</sup>

A governmental body’s final action, decision, or vote on any matter within its jurisdiction may be taken only in an open session.<sup>387</sup> The governmental body may not vote by secret ballot.<sup>388</sup> It may not take action by written agreement without meeting.<sup>389</sup> If authority to make a decision is delegated to an employee of a governmental body, the decision need not be made at an open

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<sup>381</sup> Tex. Att’y Gen. Op. Nos. H-188(1973), JC-0169 (2000).

<sup>382</sup> Tex. Att’y Gen. Op. No. JC-0307 (2000).

<sup>383</sup> Tex. Gov’t Code § 551.023.

<sup>384</sup> Tex. Att’y Gen. Op. No. JC-0169 (2000).

<sup>385</sup> Tex. Gov’t Code § 551.042; Tex. Att’y Gen. Op. No. GA-0668 (2008).

<sup>386</sup> Tex. Gov’t Code § 551.0411(a); *see also* Tex. Att’y Gen. Op. No. DM-482 (1998); *Rivera v. City of Laredo*, 948 S.W.2d 787 (Tex. App.—San Antonio 1997, writ denied).

<sup>387</sup> Tex. Gov’t Code § 551.102; *Weatherford v. City of San Marcos*, 157 S.W.3d 473, 485-86 (Tex. App.—Austin 2004, pet. denied); *Tex. State Bd. of Pub. Accountancy v. Bass*, 366 S.W.3d 751, 760 (Tex. App.—Austin 2012, no pet.).

<sup>388</sup> Tex. Att’y Gen. Op. Nos. H-1163 (1978), JC-307(2000).

<sup>389</sup> *Webster v. Tex. & Pac. Motor Transp. Co.*, 166 S.W.2d 75, 76-77 (Tex. 1942); Tex. Att’y Gen. Op. No. JM-120 (1983).

meeting.<sup>390</sup> 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.<sup>391</sup>

The OMA allows governmental bodies to meet by telephone or video conference call under certain circumstances.<sup>392</sup> 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.<sup>393</sup> 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.<sup>394</sup> If a quorum is present at the meeting location, a teleconference meeting with the missing members is not authorized by the OMA.<sup>395</sup> The notice of meeting need not state that a meeting will be conducted as a telephone conference call.<sup>396</sup>

During an open or closed session of a meeting, a governmental body may consult with its attorney by telephone or videoconference call or over the Internet.<sup>397</sup> If the consultation is in a public session, it must be audible to the public.<sup>398</sup> Most governmental bodies may not consult with their attorney using one of these methods if the attorney is an employee of the agency.<sup>399</sup>

## **Videoconference Calls and Internet Broadcasts**

A governmental body may hold an open or closed meeting by videoconference call, subject to certain restrictions in the Open Meetings Act.<sup>400</sup> A member or employee of a governmental body may participate remotely in a meeting provided that there is a video or audio feed that is broadcast live.<sup>401</sup> The governmental body must make at least an audio recording of the meeting and the recording shall be made available to the public.<sup>402</sup> Each portion of a videoconference call meeting must allow the public to clearly see and hear each speaking meeting participant during the meeting.<sup>403</sup> If a problem occurs making the meeting no longer visible and audible to the public, the meeting must be recessed until the problem is resolved; if the problem is not resolved in six

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<sup>390</sup> *City of San Antonio v. Aguilar*, 670 S.W.2d 681, 686 (Tex. App.—San Antonio 1984, writ dismissed); Tex. Att’y Gen. Op. No. MW-32 (1979).

<sup>391</sup> *Davis v. Duncanville Indep. Sch. Dist.*, 701 S.W.2d 15, 17 (Tex. App.—Dallas 1985, writ dismissed w.o.j.).

<sup>392</sup> Tex. Gov’t Code §§ 551.121-.127; Tex. Att’y Gen. Op. No. DM-478 (1998).

<sup>393</sup> Tex. Gov’t Code § 551.125.

<sup>394</sup> Tex. Gov’t Code §§ 551.121-.125.

<sup>395</sup> Tex. Att’y Gen. Op. Nos. JC-0352 (2001), JC-0194 (2000).

<sup>396</sup> Tex. Att’y Gen. Op. No. JC-0352 (2001).

<sup>397</sup> Tex. Gov’t Code § 551.129(a).

<sup>398</sup> Tex. Gov’t Code § 551.129(b).

<sup>399</sup> Tex. Gov’t Code § 551.129(d).

<sup>400</sup> Tex. Gov’t Code § 551.127(a).

<sup>401</sup> Tex. Gov’t Code § 551.127(a-1).

<sup>402</sup> Tex. Gov’t Code § 551.127(g).

<sup>403</sup> Tex. Gov’t Code § 551.127(f), (h).

hours or less, the meeting must be adjourned.<sup>404</sup> A member of a governmental body who participates remotely by videoconference call shall be counted as present at the meeting for all purposes.<sup>405</sup> However, the 85th Legislature amended § 551.127 to add that a member of a governmental body who participates in a meeting by videoconference call shall be considered absent from any portion of the meeting during which audio or video communication is lost.<sup>406</sup> In that case, the meeting may only continue if a quorum of the body remains present.<sup>407</sup> A governmental body may allow a member of the public to testify at a meeting from a remote location by videoconference call, regardless of whether any member of the body is participating by videoconference call.<sup>408</sup> There are other requirements in the Act related to standards for audio and video signals and videoconference meetings that extend into three or more counties.<sup>409</sup>

A governmental body also has the discretion to broadcast an open meeting over the Internet, provided it establishes an internet site, provides access to the broadcast from that site, and provides proper notice.<sup>410</sup> The Open Meetings Act contains specific requirements and exceptions applicable to internet broadcasts by certain transit authorities, elected school district boards of trustees, and elected governing bodies of home-rule municipalities.<sup>411</sup>

## Closed Meetings or Executive Sessions

All meetings of a governmental body are open to the public unless a closed meeting is specifically authorized.<sup>412</sup> The OMA provides certain narrowly drawn exceptions to the requirement that meetings of a governmental body be open to the public. The authorized closed meetings are also commonly known as closed sessions or executive sessions.

For a governmental body to hold a closed meeting that complies with the OMA, 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 meeting will be held and identify the sections of the OMA authorizing the closed meeting.<sup>413</sup> [See **Figure 29: Presiding Officer’s Script for Closed Meeting or Executive Session**; **Figure 30: Sample Posting of Agenda Item to Terminate an Agency’s Executive Director**; and **Figure 31: Sample Posting of Agenda Item to Discuss Legal Matters in a Closed Meeting or Executive Session.**] An executive session may be continued from one day to the next, so long as, before convening the executive session on

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<sup>404</sup> Tex. Gov’t Code § 551.127(f).

<sup>405</sup> Tex. Gov’t Code § 551.127(a-2).

<sup>406</sup> Tex. Gov’t Code § 551.127(a-3).

<sup>407</sup> *Id.*

<sup>408</sup> Tex. Gov’t Code § 551.127(k).

<sup>409</sup> Tex. Gov’t Code § 551.127(c), (i), (j).

<sup>410</sup> Tex. Gov’t Code § 551.128(b), (c).

<sup>411</sup> Tex. Gov’t Code § 551.128(b)(1)-(b-6).

<sup>412</sup> Tex. Gov’t Code §§ 551.002, .071-.090.

<sup>413</sup> Tex. Gov’t Code § 551.101; *Standley v. Sansom*, 367 S.W.3d 343, 354 (Tex. App.—San Antonio 2012, pet. denied).

the second day, the governmental body first meets in open session in accordance with § 551.101 of the OMA.<sup>414</sup> The OMA 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.<sup>415</sup> A governmental body may include in its posting a general notice that the entity may go into closed session as permitted by the OMA or provide specific notice of an intent to do so if planned at the time of posting. **[Compare Figures 27, 30, and 31.]** 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.<sup>416</sup> To avoid having to defend against a claimed violation of the OMA, a governmental body should not change its practice in a meeting before making corresponding changes in its postings.<sup>417</sup>

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;**<sup>418</sup>
- **real estate, if deliberation in an open meeting would have a detrimental effect on the governmental body's negotiating position;**<sup>419</sup>
- **prospective gifts, if deliberation in an open meeting would have a detrimental effect on the governmental body's negotiating position;**<sup>420</sup>
- **certain personnel matters, or to hear a complaint against an officer or employee;**<sup>421</sup> or
- **the deployment of security personnel, or devices or a security audit.**<sup>422</sup>

The OMA 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.<sup>423</sup> County commissioners courts may discuss certain personnel matters involving members of advisory committees or complaints against the members.<sup>424</sup> School boards may discuss matters involving the discipline of a child or certain complaints against district

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<sup>414</sup> Tex. Att'y Gen. Op. No. JC-0285 (2000).

<sup>415</sup> Tex. Att'y Gen. Op. No. JC-0057 (1999).

<sup>416</sup> *Id.*; *River Rd. Neighborhood Ass'n*, 720 S.W.2d at 557.

<sup>417</sup> *See* Tex. Att'y Gen. Op. No. JC-0057 (1999); *River Rd. Neighborhood Ass'n*, 720 S.W.2d at 557.

<sup>418</sup> Tex. Gov't Code § 551.071.

<sup>419</sup> Tex. Gov't Code § 551.072.

<sup>420</sup> Tex. Gov't Code § 551.073.

<sup>421</sup> Tex. Gov't Code § 551.074; *Gardner v. Herring*, 21 S.W.3d 767, 777 (Tex. App.—Amarillo 2000, no pet.) (.074 does not authorize closed discussions about policy and its application to employees in general or a class of unnamed employees).

<sup>422</sup> Tex. Gov't Code § 551.076.

<sup>423</sup> Tex. Gov't Code § 551.088.

<sup>424</sup> Tex. Gov't Code § 551.0745.

employees.<sup>425</sup> 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.<sup>426</sup> Statutory authorization to conduct closed sessions may appear in statutes other than the Open Meetings Act. For example, the Teacher Retirement System's board of trustees is authorized to meet in closed sessions for three specific reasons one being to discuss with the internal or external auditors the auditors' ability to perform duties in accordance with the Internal Audit Chapter.<sup>427</sup> One such provision previously limited to the Department of Information Resources (DIR) was recently expanded to include all governmental bodies. The 85th Legislature amended an exception formerly limited to DIR to allow all governmental bodies to meet in closed session to deliberate regarding security assessments or deployments relating to information resources technology, network security information and the deployment and implementation of security personnel, critical infrastructure, or security devices.<sup>428</sup>

The foregoing discussion is not exhaustive of all instances when governmental bodies are authorized to conduct closed meetings. Readers are advised to study the OMA 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. Primarily that means, the members of the governing body and any employee necessary for the discussion to be held.<sup>429</sup> A governing body may not invite members of the public into a closed meeting to provide comment.<sup>430</sup>

While a governmental body may meet in a closed session, it may not take any final vote or action in an executive session.<sup>431</sup> The actual decision has to be made in public.<sup>432</sup> This prohibition, however, does not restrict members in a closed session from expressing their opinions on an issue or announcing how they expect to vote on the issue in the open meeting, so long as the actual vote

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<sup>425</sup> Tex. Gov't Code § 551.082.

<sup>426</sup> Tex. Gov't Code §§ 551.079-.081.

<sup>427</sup> Tex. Gov't Code § 825.115(d)-(e).

<sup>428</sup> Tex. Gov't Code § 551.089.

<sup>429</sup> Tex. Att'y Gen. Op. No. JC-0375 (2001), at 2 (school board may require its superintendent to attend all of its closed meetings); *see also* Tex. Att'y Gen. Op. Nos. JC-0506 (2002), at 6 (commissioner's 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 commissioner's court).

<sup>430</sup> Tex. Att'y Gen. Op. No. GA-0511 (2007).

<sup>431</sup> Tex. Gov't Code § 551.102; *Nash v. Civil Serv. Comm'n, Palestine, Tex.*, 864 S.W.2d 163, 166 (Tex. App.—Tyler 1993, no writ); *Bd. of Trs. of Austin Indep. Sch. Dist. v. Cox Enters., Inc.*, 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 Indep. Sch. Dist. v. Pecos-Barstow Indep. Sch. Dist.*, 466 S.W.2d 377, 378 (Tex. Civ. App.—San Antonio 1971, no writ).

<sup>432</sup> *Weatherford v. City of San Marcos*, 157 S.W.3d 473, 485 (Tex. App.—Austin 2004, pet. denied); *Tex. State Bd. of Pub. Accountancy v. Bass*, 366 S.W.3d 751, 760 (Tex. App.—Austin 2012, no pet.).

or decision is made in the open session.<sup>433</sup> 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 or Recording

The OMA requires a governmental body to “prepare and keep minutes or make a recording<sup>434</sup> of each open meeting of the body.”<sup>435</sup> If minutes are kept instead of a recording, the minutes must indicate the subject of each deliberation and the vote, order or decision made on each item.<sup>436</sup> The minutes or recordings must be made available to the public upon request.<sup>437</sup> Also, the OMA requires that a governmental body make and keep either a certified agenda or a recording of each closed session, except for a closed session held by the governmental body to consult with its attorney.<sup>438</sup> [See **Figure 32: Sample Certified Agenda of Closed Meeting or Executive 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.<sup>439</sup> 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.<sup>440</sup>

## Violations of the Open Meetings Act

Several remedies are available to the public when a governmental body violates the OMA. Any action taken by the governmental body in an unlawful meeting is voidable.<sup>441</sup> Any interested person may bring a mandamus or injunction action to stop, prevent, or reverse a violation of the OMA.<sup>442</sup> Additionally, members of a governmental body are subject to criminal penalties in the following situations:

- **if they knowingly conspire to circumvent the OMA by meeting in numbers less than a quorum for the purpose of secret deliberations;**<sup>443</sup>

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<sup>433</sup> *Thompson v. City of Austin*, 979 S.W.2d 676, 685 (Tex. App.—Austin 1998, no pet.); *Nash*, 864 S.W.2d at 166; *City of Dall. v. Parker*, 737 S.W.2d 845, 850 (Tex. App.—Dallas 1987, no writ); *Weatherford*, 157 S.W.3d at 486.

<sup>434</sup> Tex. Gov’t Code § 551.001(7) (definition of “recording”).

<sup>435</sup> Tex. Gov’t Code § 551.021(a).

<sup>436</sup> Tex. Gov’t Code § 551.021(b).

<sup>437</sup> Tex. Gov’t Code § 551.022.

<sup>438</sup> Tex. Gov’t Code § 551.103(a).

<sup>439</sup> Tex. Gov’t Code § 551.103(b).

<sup>440</sup> Tex. Gov’t Code § 551.103(c).

<sup>441</sup> Tex. Gov’t Code § 551.141.

<sup>442</sup> Tex. Gov’t Code § 551.142.

<sup>443</sup> Tex. Gov’t Code § 551.143; Tex. Att’y Gen. Op. No. GA-0326 (2005).

- if they knowingly call or aid in calling, close or aid in closing, or participate in an unauthorized closed meeting;<sup>444</sup>
- if they participate in a closed meeting knowing that a certified agenda or recording is not being made;<sup>445</sup> or
- if they knowingly disclose to a member of the public a certified agenda or recording of a closed session.<sup>446</sup>

## Open Meetings Act Training Requirements

Each elected or appointed public official who is a member of a governmental body subject to the OMA is required to complete a course of training of not less than one and not more than two hours regarding the responsibilities of the governmental body and its members not later than the 90th day after the date the member is required to take the oath of office or otherwise assumes responsibilities as a member of the governmental body.<sup>447</sup> A certificate of course completion is admissible as evidence in a criminal prosecution under the OMA.<sup>448</sup>

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<sup>444</sup> Tex. Gov't Code § 551.144(a)(1)-(3); *Tovar v. State*, 978 S.W.2d 584 (Tex. Crim. App. 1998).

<sup>445</sup> Tex. Gov't Code § 551.145.

<sup>446</sup> Tex. Gov't Code § 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.

<sup>447</sup> Tex. Gov't Code § 551.005(a).

<sup>448</sup> Tex. Gov't Code § 551.005(g).

**Figure 27: 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
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 Rule 71, 22 TAC § 71.2, relating to application for license, as published in 23 Tex. Reg. 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 ch. 551.**

**Figure 28: 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 [BOARD/COMMISSION] [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 additional 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 [BOARD/COMMISSION] is adjourned.*

**Figure 29: Presiding Officer’s Script for Closed Meeting or Executive Session**

**PRESIDING OFFICER’S SCRIPT FOR CLOSED OR EXECUTIVE SESSION**

IN OPEN SESSION:

*The [BOARD/COMMISSION] 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 of the Act.]*

*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.]

[Make a written certified agenda or record closed session on a separate audio tape. 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 a recorder is on. Not necessary for sessions solely under § 551.071.]

[When closed session deliberation is ended]

*This closed session is ended. The date is \_\_\_\_\_. The time is \_\_\_\_\_.*

[Open door, remove closed session tape and insert open meeting tape in recorder, turn on recorder, and reconvene.]

*The board/commission 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 30: 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 ch. 551.**

**Figure 31: Sample Posting of Agenda Item to Discuss Legal Matters in a Closed Meeting or Executive 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 ch. 551.**

**Figure 32: Sample Certified Agenda of Closed Meeting or Executive Session**

**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 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

# The Texas Public Information Act

The purpose of the Public Information Act<sup>449</sup> (PIA) is to provide each person with complete information about the affairs of government and the official acts of public officials and employees.<sup>450</sup> As a general rule, public information is either open to all members of the public or closed to all members of the public. Requests for information from members of the public are treated uniformly, without regard to the requestor's identity or purpose.<sup>451</sup> However, in some instances, individuals have a special statutory right of access to information that concerns their privacy interests.<sup>452</sup> When a requestor has a special statutory right of access to information requested under the PIA, the information would only be available to that individual or that individual's personal representative and not to other members of public. Another narrow instance when a requestor's identity is considered is when the requestor is imprisoned or confined in a correctional facility. A governmental body is not required to respond to a request for information from an individual who is imprisoned or confined in a correctional facility or from the individual's agent other than the individual's attorney.<sup>453</sup>

Under the PIA, information in the possession of a governmental body is presumed open to the public unless the information falls within one of the PIA's specific exceptions to disclosure.<sup>454</sup> Section 552.021 requires governmental bodies to make public information available during normal business hours.<sup>455</sup> Public information includes information "written, produced, collected, assembled, or maintained under law or ordinance or in connection with the transaction of official business . . . by a governmental body."<sup>456</sup> Notably, public information is defined as information on *any device*.<sup>457</sup> The PIA does not distinguish between personal or employer-issued devices, but rather focuses on the nature of the communication. If the communication is used in connection with the transaction of "official business," meaning, "any matter over which a governmental body has any authority, administrative duties, or advisory duties," the communication constitutes public information.<sup>458</sup> Further, public information can be recorded in practically any form, including book, paper, letter, document, email, Internet posting, text message, instant message, or other electronic communication, voice, tape, video, and many other forms.<sup>459</sup> However, tangible items,

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<sup>449</sup> The Texas Public Information Act was formerly called the Texas Open Records Act. For more information about the PIA, please see the *Public Information Act Handbook* on the Attorney General's website at <https://www.texasattorneygeneral.gov/og/open-government-related-publications>.

<sup>450</sup> Tex. Gov't Code § 552.001.

<sup>451</sup> Tex. Gov't Code §§ 552.007(b), .223.

<sup>452</sup> Tex. Gov't Code §§ 552.023, .102(a); *see also* Tex. Gov't Code § 552.114. Also, statutes outside of the PIA can create special rights of access. *See, e.g.*, Tex. Occ. Code § 901.160.

<sup>453</sup> Tex. Gov't Code § 552.028(a).

<sup>454</sup> Tex. Gov't Code §§ 552.002(a), .006.

<sup>455</sup> Tex. Gov't Code § 552.021.

<sup>456</sup> Tex. Gov't Code § 552.002(a).

<sup>457</sup> Tex. Gov't Code § 552.002(a-2).

<sup>458</sup> Tex. Gov't Code § 552.003(2-a).

<sup>459</sup> Tex. Gov't Code § 552.002(c).

such as tools and keys, are not “information” subject to the PIA.<sup>460</sup> Also, the PIA only applies to information already in existence and does not require a governmental body to create a document.<sup>461</sup> Likewise, a governmental body is not required to perform legal or library research or to answer questions.<sup>462</sup>

For purposes of the PIA, the definition of a “governmental body” encompasses all state and local governmental entities.<sup>463</sup> This definition includes entities that are part of the legislative and executive branches of government, school districts, county commissioner’s courts, county boards of education, and district attorney offices.<sup>464</sup> A governmental body is defined as “the part, section, or portion of an organization, corporation, commission, committee, institution, or agency that spends or that is supported in whole or in part by public finds.”<sup>465</sup> In 2015, the Texas Supreme Court defined “‘supported in whole or in part by public finds’ to include only those private entities or their sub-parts sustained, at least in part, by public funds, meaning the entity could not perform the same or similar services without public funds.”<sup>466</sup> The PIA does not apply to private persons or businesses that are not supported by or spend public funds. Simply providing goods or services under a contract with a governmental body does not make a person or business subject to the PIA.<sup>467</sup> The judiciary is expressly excluded from the definition of a governmental body, and is not subject to the PIA.<sup>468</sup> Rule 12 of the Texas Rules of Judicial Administration governs the release of judicial records. The PIA does not apply to requests for information received by federal agencies, such as the Department of Justice, the Department of Homeland Security, or the Social Security Administration. The Freedom of Information Act (FOIA) applies to requests sent to federal agencies.<sup>469</sup> Also, determinations about whether student educational records are confidential under the Family Education Rights and Privacy Act (FERPA)<sup>470</sup> must be made by the educational authority in possession of the record.

A governmental body’s duty to produce public information commences when it receives a written request.<sup>471</sup> To be a valid request, it must be in writing and can be typed or handwritten. A request can be transmitted by hand-delivery, mail, electronic mail, or facsimile.<sup>472</sup> Upon receipt of the

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<sup>460</sup> Tex. Att’y Gen. ORD-581 (1990).

<sup>461</sup> 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).

<sup>462</sup> Tex. Att’y Gen. ORD-563 (1990); Tex. Att’y Gen. ORD-555 (1990); *see also* Tex. Gov’t Code § 552.227.

<sup>463</sup> Tex. Gov’t Code § 552.003(1).

<sup>464</sup> *Id.*

<sup>465</sup> Tex. Gov’t Code § 552.003(1)(A)(xii); *see* Tex. Gov’t Code § 552.003(5) (“‘Public funds’ means funds of the state or of a governmental subdivision of the state.”).

<sup>466</sup> *Greater Hous. P’ship v. Paxton*, 468 S.W.3d 51, 63 (Tex. 2015).

<sup>467</sup> Tex. Att’y Gen. ORD-1 (1973); Tex. Att’y Gen. ORD-602 (1992); Tex. Att’y Gen. ORD-569 (1990); Tex. Att’y Gen. ORD-510 (1988); Tex. Att’y Gen. ORD-317 (1982).

<sup>468</sup> Tex. Gov’t Code § 552.003(1)(B); *see also* Tex. Gov’t Code § 552.0035.

<sup>469</sup> 5 U.S.C. § 552.

<sup>470</sup> 20 U.S.C. § 1232g (2012); 34 C.F.R. § 99 (2016).

<sup>471</sup> Tex. Gov’t Code § 552.301(a); Tex. Att’y Gen. ORD-663 (1999).

<sup>472</sup> Tex. Gov’t Code § 552.301(c).

written request, a governmental body must “promptly produce public information for inspection, duplication, or both.”<sup>473</sup> “‘Promptly’ means as soon as possible under the circumstances, that is, within a reasonable time, without delay.”<sup>474</sup> To promptly produce public information, a governmental body must either provide the information for inspection, duplication, or both, in its offices or send copies of the information by first class United States mail to the requestor.<sup>475</sup> If the requestor wants information that is on the governmental body’s website, the public information officer can refer the requestor to the exact Internet location or uniform resource locator (URL) address.<sup>476</sup> However, if the requestor prefers a manner other than access through the URL address, the governmental body must supply the information in the requested manner.<sup>477</sup> An officer for public information must prominently display a sign that contains basic information about the rights of a requestor, the responsibilities of a governmental body, and the procedures for inspecting or obtaining a copy of public information under the PIA.<sup>478</sup>

The questions a governmental body may ask a requestor when responding to a request are expressly limited.<sup>479</sup> A governmental body may not ask why a requestor wants the information.<sup>480</sup> The purpose for which a requestor wants public information is not relevant to the governmental body’s duty to disclose the information.<sup>481</sup> A public information officer is not responsible for how the requestor uses public information.<sup>482</sup> A governmental body may ask a requestor to clarify a vague request or to narrow an overly broad request.<sup>483</sup> When a governmental body, acting in good faith, requests clarification or narrowing of an unclear or over-broad request, the ten business day period to seek an attorney general decision is measured from the date the request is clarified or narrowed.<sup>484</sup> **[Figure 33: Response to Request for Public Information, Asking for Clarification; Figure 34: Response to Request for Public Information, No Documents Found.]** If a governmental body has not received a response from a requestor by the sixty-first day after a written request for clarification was sent, the request for information may be considered withdrawn.<sup>485</sup> However, the governmental body must exactly comply with the notice requirements of § 552.222(e) for the request to be considered withdrawn.<sup>486</sup> **[Figure 33.]** If the request for

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<sup>473</sup> Tex. Gov’t Code § 552.221(a).

<sup>474</sup> *Id.*

<sup>475</sup> Tex. Gov’t Code § 552.221(b).

<sup>476</sup> Tex. Gov’t Code § 552.221(b-1).

<sup>477</sup> *Id.*; *see also* Tex. Gov’t Code § 552.221(b-2) (If URL address is sent by email, the email must contain a statement in a conspicuous font clearly indicating that the requestor may receive the information in another manner.).

<sup>478</sup> Tex. Gov’t Code § 552.205(a). A copy of the PIA sign is available on the Attorney General’s website at <https://www.texasattorneygeneral.gov/og/open-government-related-publications>.

<sup>479</sup> Tex. Gov’t Code § 552.222(a).

<sup>480</sup> *See id.*

<sup>481</sup> *Indus. Found. of the S. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 674 (Tex. 1976) (motives of a requestor are not considered in determining whether the information may be disclosed).

<sup>482</sup> Tex. Gov’t Code § 552.204(1).

<sup>483</sup> Tex. Gov’t Code § 552.222(b); *City of Dall. v. Abbott*, 304 S.W.3d 380 (Tex. 2010); Tex. Att’y Gen. ORD-663 (1999).

<sup>484</sup> *City of Dall. v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010).

<sup>485</sup> Tex. Gov’t Code § 552.222(d).

<sup>486</sup> Tex. Gov’t Code § 552.222(e), (f).

public information was sent by email, then the public information officer can send the request for clarification or additional information to the same email address from the original request or an email address provided by the requestor.<sup>487</sup> As with the written request, if the public information officer does not receive a written response or a response by email in the appropriate time, the request is considered withdrawn.<sup>488</sup>

## Inspection and Copies of Public Information and 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.<sup>489</sup> If the governmental body cannot immediately provide the information, it must notify the requestor within ten business days in writing of a reasonable date and time at which the information will be available.<sup>490</sup> 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 twenty days.<sup>491</sup>

The Act requires a governmental body to make the requested public information available for inspection and duplication in the offices of the governmental body. Alternatively, the governmental body may provide a copy of the requested information to the requestor by mail, upon the requestor's agreement.<sup>492</sup> **[See Figure 35: Response to Request for Public Information, No Charge for Inspection or for Copies Totaling Less Than \$40.]** The PIA requires a governmental body to allow inspection at least during business hours<sup>493</sup> and must do so in a place that allows a requestor to take advantage of the rights granted under the PIA.<sup>494</sup> A requestor must complete the inspection within ten business days of the date the custodian makes the information available, though the requestor may request additional time.<sup>495</sup> 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.<sup>496</sup> The PIA does not require a governmental body to provide duplicate copies of information that has been previously furnished to a requestor or that has already been made available to that requestor. Instead, the governmental body may respond in writing to the requestor, as required by the PIA, to inform the requestor of the previous request and the governmental body's response.<sup>497</sup>

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<sup>487</sup> Tex. Gov't Code § 552.222(g)(1).

<sup>488</sup> Tex. Gov't Code § 552.222(g)(2).

<sup>489</sup> Tex. Gov't Code § 552.228(a), (b).

<sup>490</sup> Tex. Gov't Code § 552.221(d).

<sup>491</sup> Tex. Gov't Code § 552.231.

<sup>492</sup> Tex. Gov't Code § 552.221(b).

<sup>493</sup> Tex. Gov't Code § 552.021.

<sup>494</sup> Tex. Gov't Code § 552.224.

<sup>495</sup> Tex. Gov't Code § 552.225.

<sup>496</sup> Tex. Gov't Code § 552.308.

<sup>497</sup> Tex. Gov't Code § 552.232.

A requestor may ask to view the information, receive copies of the information or both. If a request is for copies of the information, the governmental body may charge for the copies. If the request is only for an opportunity to inspect the information, then ordinarily the governmental body cannot charge for copies. The PIA does not authorize a governmental body to charge for providing a governmental publication that is otherwise free.<sup>498</sup> Nor may a governmental body charge for electronic copies of public information that are available by direct access to its website.<sup>499</sup> As mentioned before, if the information requested is on the governmental body's website, the public information officer can refer the requestor to the exact Internet location where the information can be found and fulfill its obligation under the PIA.<sup>500</sup> However, if the requestor prefers the information in a different manner, the governmental body must supply the information in the requested manner. The OAG 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. However, such charges may not exceed the OAG charges by 25 percent, unless an exemption has been granted by the OAG.<sup>501</sup> A governmental body may provide copies of documents at a reduced price or even at no cost.<sup>502</sup> **[Figure 36: Response to Request for Public Information, No Charge for Copies.]**

A governmental body must provide to the requestor a written, itemized estimate of the charges if it is determined that copies or inspection of the information will result in an amount that exceeds \$40. If an alternative, less costly method of viewing the records is available, the governmental body must also inform the requestor of that option in its estimate. The PIA sets out the required contents of the cost estimate, procedures regarding a situation where the estimate has increased to greater than 20 percent of the original estimate, and the maximum allowable charge for copying or inspection in this situation.<sup>503</sup> 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.<sup>504</sup>

A requestor who believes a governmental body has charged too much may seek review of charges by the attorney general.<sup>505</sup> If the requestor was overcharged because a governmental body failed

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<sup>498</sup> Tex. Gov't Code § 552.270.

<sup>499</sup> Tex. Att'y Gen. ORD-668 (2000).

<sup>500</sup> Tex. Gov't Code § 552.221(b-1).

<sup>501</sup> Tex. Gov't Code § 552.262.

<sup>502</sup> Tex. Gov't Code § 552.267.

<sup>503</sup> Tex. Gov't Code § 552.2615.

<sup>504</sup> Tex. Gov't Code § 552.263.

<sup>505</sup> Tex. Gov't Code § 552.269.

or refused to follow OAG rates, the requestor may be entitled to receive three times the amount of the overcharge.<sup>506</sup>

For more information on permissible charges under the PIA, you may contact the Cost Rules Hotline toll-free at (888) 672-6787 (ORCOSTS), or locally at (512) 475-2497. Cost information is also available online at: <https://www.texasattorneygeneral.gov/og/charges-for-public-information>.

## Requesting an Attorney General Decision

In the open records context, the attorney general issues two distinct types of decisions, open records letter rulings and open records decisions. An open records letter ruling is applicable only to the governmental body requesting the decision, the specific documents, and the specific circumstances. The Open Records Division of the OAG issues thousands of letter rulings per year. This type of decision is discussed in greater detail in this section. Open records decisions, however, are formal opinions that usually address novel or problematic legal questions and are signed by the attorney general. The Open Records Division also issues previous determinations. A previous determination is an attorney general decision, either an open records letter ruling or an open records decision, which allows a particular governmental body or a class of governmental bodies to withhold certain categories of information without requesting a new ruling.<sup>507</sup> Most often previous determinations are only applicable to the precise information previously ruled on by the OAG, but some previous determinations apply to a broader range of governmental bodies or information.<sup>508</sup> All attorney general decisions are available for view on the Attorney General's open government webpage.

If a governmental body believes an exception to disclosure applies to the requested information, it must request a decision from the attorney general within specific deadlines.<sup>509</sup> Some information, by statute, attorney general decision, or previous determination, can be redacted without requesting a decision from the attorney general, such as the social security number of a living person and bank account numbers.<sup>510</sup> However, most public information cannot be redacted or withheld from the public without requesting an attorney general decision. If a governmental body redacts information based on one of these specific exceptions that also requires notifying the requestor, it must use the form letter available on the attorney general's website to inform requestors of

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<sup>506</sup> Tex. Gov't Code § 552.269(b).

<sup>507</sup> See Tex. Att'y Gen. ORD-673 (2001) (defining "previous determination").

<sup>508</sup> See, e.g., Tex. Att'y Gen. ORD-684 (2009) (covers several categories of information, including direct deposit authorization forms, W-2 and W-4 forms, fingerprints, military discharge records, certified agenda, and tape of closed meeting).

<sup>509</sup> Tex. Gov't Code §§ 552.301, .302, .308, .309(a).

<sup>510</sup> See, e.g., Tex. Gov't Code §§ 552.147 (social security number), .130 (motor vehicle records), .136 (credit card, debit card, charge card, and access device numbers); see Tex. Att'y Gen. ORD-684 (2009); Tex. Att'y Gen. ORD-670 (2001).

redactions made without requesting a letter ruling.<sup>511</sup> When a governmental body requests a decision from the attorney general, it must notify the requestor.<sup>512</sup> Furthermore, a governmental body must make a good faith effort to provide written notice to any person or entity whose personal or proprietary interests may be implicated by release of the requested information.<sup>513</sup> The requestor, the public, and third parties may submit comments on their own behalf to the attorney general before a decision is issued.<sup>514</sup> The notice provisions give all participants an opportunity to be heard.

A governmental body must comply with all the procedural requirements set out in Texas Government Code § 552.301 in order to withhold requested information from the public.<sup>515</sup> A governmental body must request a decision from the attorney general no later than the tenth business day after receipt of the written request;<sup>516</sup> otherwise the requested information is presumed public.<sup>517</sup> When asking for a decision, a governmental body must properly raise and explain the applicability of each exception it is claiming.<sup>518</sup> This is important, as the PIA expressly provides that if an exception is not properly raised before the attorney general in requesting an open records decision, that exception may not later be asserted in any subsequent lawsuit filed under the PIA, unless the raised exception is based on a requirement of federal law, involves the property or privacy interest of another person or otherwise makes information confidential by law.<sup>519</sup> Failure to comply with the requirements of § 552.301 will generally result in the waiver of any asserted permissive exceptions to disclosure.<sup>520</sup> To guard against waiving an applicable exception, a governmental body should ensure compliance with each of these requirements, as follows:

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

1. submit to the attorney general the governmental body's request for a decision, stating each claimed exception;
2. provide to the requestor a written statement that the governmental body wishes to withhold the requested information and has requested a decision from the attorney general; and

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<sup>511</sup> The forms are available at <https://www.texasattorneygeneral.gov/og/redacting-public-information-rules-and-forms>. For example, §§ 552.024, 552.130, 552.136, and 552.138 of the Government Code all require notification.

<sup>512</sup> Tex. Gov't Code § 552.301.

<sup>513</sup> Tex. Gov't Code § 552.305(d).

<sup>514</sup> Tex. Gov't Code §§ 552.301(e-1), .304, .305.

<sup>515</sup> See Tex. Gov't Code §§ 552.301, .302.

<sup>516</sup> Tex. Gov't Code § 552.301(b).

<sup>517</sup> Tex. Gov't Code § 552.302.

<sup>518</sup> Tex. Gov't Code §§ 552.301, .303.

<sup>519</sup> Tex. Gov't Code § 552.326.

<sup>520</sup> Tex. Gov't Code § 552.302. Permissive exceptions are discussed in more detail in the section titled Common Exceptions to Disclosure.

3. provide to the requestor a copy of the written communication to the attorney general asking for a decision.<sup>521</sup> If this communication contains the substance of the requested information, it may be redacted only to the extent that the substance of the requested information is not revealed.

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

1. provide written comments stating the reasons why the exception applies for each claimed exception. This usually requires providing specific facts that demonstrate an exception's applicability to the information;
2. provide a copy of the request for information;
3. provide a copy 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;
4. include a signed statement as to the date on which the governmental body received the request for information or sufficient evidence establishing the date;<sup>522</sup> and
5. provide to the requestor a copy of any comments submitted to the attorney general explaining why the raised exceptions to disclosure apply. If the written comments disclose the substance of the information requested, the governmental body may provide a redacted copy.<sup>523</sup>

Accordingly, a governmental body must strictly adhere to these requirements in providing the specified documentation and information to the attorney general, as well as the provision of certain documentation to the requestor of the information.<sup>524</sup> **[See Figure 37: Response to Request for Public Information, Claiming Exemptions.]** If the above steps are not followed by the governmental body, the information is presumed public and must be released unless a compelling reason exists to withhold the information.<sup>525</sup> Once the attorney general has determined that requested information must be released and has issued a letter ruling, the governmental body must comply with the ruling or file suit challenging the decision, no later than thirty days from receipt of the ruling.<sup>526</sup> If suit is not timely filed, the governmental body must comply with the attorney general decision. A governmental body is prohibited from asking for another decision based on the same request after the attorney general or a court has determined that the information must be released.<sup>527</sup>

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<sup>521</sup> Tex. Gov't Code § 552.301(d).

<sup>522</sup> Tex. Gov't Code § 552.301(e).

<sup>523</sup> Tex. Gov't Code § 552.301(e-1).

<sup>524</sup> Tex. Gov't Code § 552.301(d), (e), (e-1).

<sup>525</sup> Tex. Gov't Code § 552.302.

<sup>526</sup> Tex. Gov't Code § 552.324(b).

<sup>527</sup> Tex. Gov't Code § 552.301(f).

## Common Exceptions to Disclosure

A governmental body may voluntarily disclose any information to the public so long as disclosure of the information does not implicate the rights of a third party or the information is not deemed confidential under law.<sup>528</sup> This includes disclosure of information subject to permissive exceptions. Permissive exceptions under the PIA are those exceptions intended to protect a governmental body's interests and do not make information confidential by law. For the most part, governmental bodies are free to release information that might otherwise be protected permissive exceptions, including:

- Section 552.103. Information Related to Litigation
- Section 552.104. Information Related to Competition or Bidding
- Section 552.108. Certain Law Enforcement Records
- Section 552.111. Agency Memoranda (Attorney Work Product)
- Section 552.116. Audit Working Papers

If a governmental body does not comply with procedures for requesting an attorney general decision, then the information is presumed public and must be released unless a compelling reason exists to withhold the information.<sup>529</sup> Generally, permissive exceptions do not qualify as compelling reasons to withhold information from disclosure.<sup>530</sup> Furthermore, permissive exceptions do not apply to “core public information.” The PIA sets out 18 categories of information that are core public information and must be released unless the information is expressly made confidential by the PIA itself or some law other than the PIA.<sup>531</sup> A list of these categories of information can be found in Texas Government Code § 552.022. Permissive exceptions do not apply to core public information because information falling within these categories can only be withheld from the public if the information is confidential under the PIA or other law.<sup>532</sup>

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<sup>528</sup> Tex. Gov't Code § 552.007(a).

<sup>529</sup> Tex. Gov't Code § 552.302.

<sup>530</sup> Tex. Att'y Gen. ORD-665, at 2 n.5 (2000); Tex. Att'y Gen. ORD-663, at 5 (1999); see *Paxton v. City of Liberty*, No. 13-13-00614-CV, 2015 WL 832087, at \*3 (Tex. App.—Corpus Christi Feb. 26, 2015, no pet.) (mem. op.) (informer's privilege and law enforcement exception were not compelling); *Simmons v. Kuzmich*, 166 S.W.3d 342, 349-50 (Tex. App.—Fort Worth 2005, no pet.) (law enforcement exception was not compelling); *Dall. Area Rapid Transit v. Dall. Morning News*, 4 S.W.3d 469, 476 (Tex. App.—Dallas 1999, no pet.) (litigation exception was waived); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ.) (litigation exception not compelling).

<sup>531</sup> Tex. Gov't Code § 552.022; *In re City of Georgetown*, 53 S.W.3d 328, 331 (Tex. 2001); *Jackson v. Tex. Dep't of Pub. Safety*, 243 S.W.3d 754 (Tex. App.—Corpus Christi 2007, pet. denied).

<sup>532</sup> For § 552.022(a)(1) information, Tex. Gov't Code § 552.108 can apply.

Some exceptions that make information confidential under the PIA include:

- Section 552.117. Confidentiality of Certain Employee Information
- Section 552.130. Confidentiality of Certain Motor Vehicle Records
- Section 552.136. Confidentiality of Credit Card, Debit Card, Charge Card, and Access Device Numbers
- Section 552.137. Certain Email Addresses

It is a criminal offense for a person to knowingly distribute information considered confidential under the PIA.<sup>533</sup> Misuse of confidential information could result in a fine, jail time, or both and constitutes official misconduct for an officer or employee of a governmental body.<sup>534</sup> Confidentiality exceptions may not be waived and can be asserted even if a governmental body does not comply with all the procedures for requesting an attorney general decision. For these reasons, confidentiality exceptions are referred to as “mandatory exceptions.”

Another commonly asserted exception under the PIA is § 552.101, which protects from disclosure information that is made “confidential by law, either constitutional, statutory, or judicial decision” outside of the PIA.<sup>535</sup> When one of these types of law outside the PIA makes information confidential, that exception is asserted in conjunction with Texas Government Code § 552.101. Exceptions often asserted through § 552.101 include confidentiality provisions found within the Family Code, Occupations Code, Health and Safety Code, as well as the doctrine of common-law privacy.

A third party exception protects the privacy or property interest of third parties. A third party could be an individual, a business, another governmental body, or vendors and contractors. Commonly asserted third party exceptions include:

- Section 552.101. Information Confidential by Law (i.e., common law-privacy)
- Section 552.104. Information Related to Competition or Bidding
- Section 552.110. Confidentiality of Trade Secrets, Commercial, or Financial Information
- Section 552.113. Confidentiality of Geological or Geophysical Information

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<sup>533</sup> Tex. Gov’t Code § 552.352.

<sup>534</sup> *Id.* at § 552.352(b), (c).

<sup>535</sup> Tex. Gov’t Code § 552.101.

- Section 552.131. Confidentiality of Certain Economic Development Negotiation Information

Third parties may assert exceptions and submit reasons why the information should be withheld to the attorney general during the letter ruling process.<sup>536</sup> Third parties may also challenge the attorney general’s rulings in district court<sup>537</sup> and raise exceptions that were not asserted before the attorney general.<sup>538</sup> Often, third party exceptions are treated as “mandatory exceptions” because a governmental body’s failure to comply with the PIA’s procedures does not waive a third party’s rights.

### **District Court Actions Under the Public Information Act**

Most PIA lawsuits will fall under one of two categories. The first is a mandamus suit against a governmental body. If a governmental body refuses to request an attorney general 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.<sup>539</sup> A requestor is not required to wait until the attorney general issues a decision to file a suit for mandamus against a governmental body, and the requestor may file a suit whether the attorney general has issued a decision or not.<sup>540</sup> The second type of action is an appeal of an attorney general ruling or decision. A governmental body or other entity whose private or proprietary information is at issue may file suit against the attorney general to withhold information that the attorney general has ruled public.<sup>541</sup> A governmental body may not sue the requestor.<sup>542</sup> A requestor may intervene, but is not required to do so.<sup>543</sup>

Additionally, upon a complaint by a person claiming to be a victim of a violation of the PIA, the attorney general or a district or county attorney may seek declaratory or injunctive relief against a governmental body that violates the PIA. The PIA sets out the procedures for filing a complaint, the 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.<sup>544</sup>

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<sup>536</sup> Tex. Gov’t Code § 552.305(b).

<sup>537</sup> Tex. Gov’t Code § 552.325(a).

<sup>538</sup> Tex. Gov’t Code § 552.326(b)(2).

<sup>539</sup> Tex. Gov’t Code § 552.321.

<sup>540</sup> See *Kallinen v. City of Hous.*, 462 S.W.3d 25, 28 (Tex. 2015).

<sup>541</sup> Tex. Gov’t Code §§ 552.324, .325.

<sup>542</sup> Tex. Gov’t Code § 552.325(a); see *State Fair of Tex. v. Riggs & Ray, P.C.*, 05-15-00973-CV, 2016 WL 4131824, at \*1 (Tex. App.—Dallas Aug. 2, 2016, no pet.) (mem. op.).

<sup>543</sup> Tex. Gov’t Code § 552.325(b).

<sup>544</sup> Tex. Gov’t Code §§ 552.3215, .323(a).

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

- willful destruction, mutilation, removal or alteration of a public document; or
- distribution of information confidential under the PIA.<sup>545</sup>

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.<sup>546</sup>

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<sup>545</sup> Tex. Gov't Code §§ 552.351, .352.

<sup>546</sup> Tex. Gov't Code § 552.353.

**Figure 33: Response to Request for Public Information, Asking for Clarification**

[DATE]

[REQUESTOR] VIA CM RRR # \_\_\_\_\_  
[ADDRESS]

Dear [REQUESTOR]:

This letter is in response to your public information 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 RESPOND TO THIS REQUEST FOR CLARIFICATION BY THE 61ST DAY AFTER THE DATE OF THIS LETTER.

Sincerely,

[GOVERNMENTAL BODY'S  
PUBLIC INFORMATION COORDINATOR]

**Figure 34: Response to Request for Public Information, No Document Found**

[DATE]

[REQUESTOR]  
[ADDRESS]

Dear [REQUESTOR]:

This letter is in response to your public information request to [GOVERNMENTAL BODY], in which you requested:

[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 35: Response to Request for Public Information, No Charge for Inspection or for Copies Totaling Less Than \$40**

[DATE]

[REQUESTOR]  
[ADDRESS]

Dear [REQUESTOR]:

This letter is in response to your public information request, dated [DATE] to [GOVERNMENTAL BODY], and in which you requested:

[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 36: Response to Request for Public Information, No Charge for Copies**

[DATE]

[REQUESTOR]  
[ADDRESS]

Dear [REQUESTOR]:

This letter is in response to your public information request to [GOVERNMENTAL BODY], in which you requested:

[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]

**Figure 37: Response to Request for Public Information, Claiming Exceptions**

[DATE]

[REQUESTOR]  
[ADDRESS]

Dear [REQUESTOR]:

This letter is in response to your public information request, dated [DATE], to [GOVERNMENTAL BODY] which we received on [DATE], and in which you requested:

[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]