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OPINION COMMITTEE

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January 26, 2009

Via Certified Mail, Return Receipt Requested 7008-1140-0001-7608-0474

Honorable Gregg Abbot
Attorney General
Attn: Opinions Division
P.O. Box 12548
Austin, Texas 78711-2548

Re: Attorney General Opinion Request regarding Maintenance of Open Meeting Minutes

Dear General Abbott:

In accordance with Government Code chapter 402 subchapter C, I hereby request an Attorney General Opinion whether the Texas State Library and Archives Commission (TSL&A) is permitted to require a state agency to create and maintain *written* minutes of the agency's open meetings, when the requirement does not merely implement nor reasonably construe the statute, but effectively negates the statutory provisions.

Administrative construction is included in this opinion request, including the history of TSL&A's rulemaking and the applicable case law.



Statute Allows for Minutes or Tape Recording

The Open Meeting Act states that a governmental body may record open meetings in lieu of minutes. Section 551.021 of the Government Code, entitled *Minutes or Tape Recording of Open Meeting Required*, follows.

Sec. 551.021. MINUTES OR TAPE RECORDING OF OPEN MEETING REQUIRED.

(a) A governmental body shall prepare and keep minutes or make a tape recording of each open meeting of the body.

(b) The minutes must:

- (1) state the subject of each deliberation; and
- (2) indicate each vote, order, decision, or other action taken.

Added by Acts 1993, 73rd Leg., ch. 268, Sec. 1, eff. Sept. 1, 1993. (Emphasis added.)

Similarly, section 551.022 of the Government Code, entitled *Minutes and Tape Recordings of Open Meeting: Public Record*, provides that the minutes of an open meeting may be tape recorded and must be made available to the public. The provision provides:

Sec. 551.022. MINUTES AND TAPE RECORDINGS OF OPEN MEETING: PUBLIC RECORD.

The minutes and tape recordings of an open meeting are public records and shall be available for public inspection and copying on request to the governmental body's chief administrative officer or the officer's designee.

Added by Acts 1993, 73rd Leg., ch. 268, Sec. 1, eff. Sept. 1, 1993. (Emphasis added.)

History of TSL&A's Rule

The Texas State Records Retention Schedule (Retention Schedule) includes a cautionary comment, stating that state agencies may not retain audio or videotapes of the meetings of governing bodies in lieu of written minutes. Instead, TSL&A requires that the proceedings of all meetings of state boards, committees, commissions, and councils must be reduced to writing. TSL&A's rule attempts to modify Government Code section 551.021.



The cautionary comment requirement was not included in the initial Retention Schedule¹ in 1994, but first appeared in the Second Edition² in 1997. When TSL&A proposed amendments to the 1994 Retention Schedule, the preamble³ stated the following reasoning and justification.

The schedule is being extensively amended to make it easier to use. Amendments to retention periods are in response to user suggestions, changes in law and regulation, and changes in the role and function of various records series. Revisions include changes to records series descriptions or retention periods, changes to the archival or vital records statutes of the series, changes to legal citations, and changes to comments about the records series.

The Second Edition of the Retention Schedule was adopted, including the following comment in Item 1.1.060 of the Retention Schedule. The same comment appears in the Third⁴ and Fourth⁵ Editions, as well.

CAUTION: Minutes of state agencies are permanent records. Audio and videotapes are not permanent media. State Agencies may not retain audio or videotapes of the meetings of governing bodies in lieu of written minutes. The proceedings of all meetings of state boards, committees, commissioners, and councils must be reduced to writing.

TSL&A's rule proposal preamble language was not sufficient to put stakeholders on notice that TSL&A was, in effect, overriding and changing the Legislature's statutory promulgation allowing a governmental body to prepare and keep minutes or make a tape recording of each open meeting. TSL&A provided no indication that the rule amendment would nullify Government Code section 551.021. Nevertheless, TSL&A's rule imposes additional burdens, conditions, and restrictions in excess of and inconsistent with the statutory provision.

¹ Retention Schedule, First Edition, proposed 19 *Tex. Reg.* 5921 (Aug. 2, 1994), Figure 1 at 19 *Tex. Reg.* 5981-6039 (Aug. 2, 1994); adopted 19 *Tex. Reg.* 8108 (Oct. 14, 1994), *eff.* Oct. 24, 1994.

² Retention Schedule, Second Edition, proposed 22 *Tex. Reg.* 7969 (Aug. 19, 1997), including Figure 1 at 22 *Tex. Reg.* 8072-8122 (Aug. 19, 1997); adopted 22 *Tex. Reg.* 11348 (Nov. 21, 1997), including Figure 1 at 22 *Tex. Reg.* 11411-1149 (Nov. 21, 1997); *eff.* Jan. 1, 1998.

³ 22 *Tex. Reg.* 7969 (Aug. 19, 1997).

⁴ Retention Schedule, Third Edition, proposed 29 *Tex. Reg.* 9481 (Oct. 8, 2004), including Figure 1 (not available in print version but only through the on-line issue of the Oct. 8, 2004, issue of the Texas Register); adopted 30 *Tex. Reg.* 1765 (March 25, 2005), without changes; *eff.* June 1, 2005.

⁵ 13 Texas Administrative Code (TAC) §6.10, Figure 13, Texas State Records Retention Schedule, Fourth Edition at page 9 section 1.1.060, effective September 1, 2007. Proposed 32 *Tex. Reg.* 2438 (May 4, 2007). Adopted 32 *Tex. Reg.* 4384 (July 13, 2007); *eff.* Sept. 1, 2007.



A review of TSL&A's jurisdiction and authority under Government Code chapter 441 follows.

- Government Code section 441.006 provides TSL&A's general powers and duties.
- Government Code section 441.152(4) charges the TSL&A's director and librarian to work with other state agencies in seeking methods to assist and encourage local governments and the custodians of local government records in the establishment and operation of efficient and economical records management programs, in reducing paperwork required of local governments by the state, and in preserving records of historical value.
- Government Code section 441.185(e) directs TSL&A to adopt rules concerning the submission of records retention schedules to the state records administrator.
- Government Code section 441.185(f) authorizes TSL&A to prescribe, by rule, a minimum retention period for any state record, unless a minimum retention period for the record is prescribed by another federal or state law, regulation, or rule of court.
- Government Code section 441.199 authorizes TSL&A to adopt rules for cost reduction and efficiency of recordkeeping by state agencies and for the state's management and preservation of records.

Government Code Chapter 441 does not appear to authorize or direct TSL&A to adopt rules requiring state administrative agencies to reduce to writing minutes of open meetings in opposition to provisions of Government Code section 551.021.

Applicable Case Law

An administrative agency's authority to promulgate rules is conferred expressly granted by statute or implicitly from the duties imposed by statute.⁶ But, the agency must not exceed its rule making authority.⁷ The only requirement is that rules and regulations must be consistent with the Constitution and statutes of this State.⁸ To determine whether an agency exceeded its rulemaking authority or whether an administrative rule conflicts with a statute, the critical factor to be considered is whether the rule is in harmony with the general objectives of the relevant

⁶ *Publ. Util. Comm'n v. City Pub. Serv. Bd.*, 53 S.W.3d 310, 315 (Tex. 2001); *Railroad Comm'n v. Lone Star Gas Co.*, 844 S.W.2d 679, 685 (Tex.1992); *State v. Jackson*, 376 S.W.2d 341, 344 (Tex.1964); *Stauffer v. City of San Antonio*, 344 S.W.2d 158, 160 (Tex. 1961); and *Dallas County Bail Bd. V. Stein*, 771 S.W.2d 577, 580 (Tex. App. — Dallas 1989, writ denied).

⁷ *Gerst v. Oak Cliff Sav. & Loan Ass'n*, 432 S.W.2d 702, 706 (Tex.1968); *State v. Rhine*, 255 S.W.3d 745, 751 (Tex. App. — Fort Worth, 2008); *Dallas County Bail Bond Bd. v. Stein*, 771 S.W.2d 577, 580 (Tex. App. — Dallas 1989, writ denied); *State Bd. of Ins. v. Deffebach*, 631 S.W.2d 794, 798 (Tex. App. — Austin 1982, writ ref'd n.r.e.); and *Jefco, Inc. v. Lewis*, 520 S.W.2d 915, 921 (Tex. Civ. App. 1975, writ ref'd n.r.e.).

⁸ *Gerst v. Oak Cliff Sav. & Loan Ass'n*, 432 S.W.2d 702, 706 (Tex.1968); *State v. Rhine*, 255 S.W.3d 745, 751 (Tex. App. — Fort Worth, 2008); *Dallas County Bail Bond Bd. v. Stein*, 771 S.W.2d 577, 580 (Tex. App. — Dallas 1989, writ denied); *State Bd. of Ins. v. Deffebach*, 631 S.W.2d 794, 798 (Tex. App. — Austin 1982, writ ref'd n.r.e.); and *Jefco, Inc. v. Lewis*, 520 S.W.2d 915, 921 (Tex. Civ. App. 1975, writ ref'd n.r.e.).



statute.⁹ However, an agency can adopt only those rules that are authorized by and consistent with its statutory authority.¹⁰

When the Legislature acts with respect to a particular matter, the administrative agency may not act to nullify the Legislative action, even if the matter is within the agency's general regulatory field.¹¹ For example, if the statute addressing a particular matter does not grant the agency the power to do something, then the agency does not have that power.¹² Therefore, the rules and regulations adopted by an administrative agency may not impose additional burdens, conditions, or restrictions in excess of or inconsistent with statutory provisions.¹³

Legislative intent is expressed through the statutes. In construing meaning, every clause, phrase, and word in a statute is used for a purpose and is to be given effect if reasonably possible.¹⁴ When considering Government Code section 551.021(a), the operative word is "or." The subsection provides that "[a] governmental body shall prepare and keep minutes or make a tape recording of each open meeting of the body." (Emphasis added.)

The Code Construction Act, Government Code section 311.011(a), provides that "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage." Absent ambiguity, the clear language of the statute is followed.¹⁵

⁹ *Railroad Comm'n v. Lone Star Gas Co.*, 844 S.W.2d 679, 685 (Tex.1992); *Gerst v. Oak Cliff Sav. & Loan Assoc.*, 432 S.W.2d 702, 706 (Tex.1968); *State Bd. of Ins. v. Deffebach*, 631 S.W.2d 794, 798 (Tex. App. — Austin 1982, writ ref'd n.r.e.); and *Jefco, Inc. v. Lewis*, 520 S.W.2d 915, 921 (Tex. Civ. App. 1975, writ ref'd n.r.e.).

¹⁰ *Railroad Comm'n v. Lone Star Gas Co.*, 844 S.W.2d 679, 685 (Tex.1992); and *State Board of Insurance v. Deffebach*, 631 S.W.2d 794, 798-799 (Tex. App. — Austin 1982, writ ref'd n.r.e.).

¹¹ *Cobra Oil & Gas Corp. v. Sadler*, 447 S.W.2d 887, 892 (Tex. 1968); and *State v. Jackson*, 376 S.W.2d 341, 344-345 (Tex. 1964).

¹² *Nueces Co. Water Control and Improvements District No. 3 v. Texas Water Rights Comm'n*, 481 S.W.2d 924, 929 (Tex. App. — Austin 1972, writ ref'd n.r.e.) relying upon *Stauffer v. City of San Antonio*, 344 S.W.2d 158, 160 (Tex. 1961).

¹³ *Hollywood Calling v. Public Util. Comm'n*, 805 S.W.2d 618, 620 (Tex. App. — Austin 1991, no writ); and *Bexar County Bail Bond Bd. V. Deckard*, 604 S.W.2d 214,216 (Tex. Civ. App. — San Antonio, 1980, no writ).

¹⁴ *Cameron v. Terrell & Garrett, Inc.*, 618 S.W.2d 535 (Tex. 1981); and *Eddins-Walcher Butane Company v. Calvert*, 298 S.W. 2d 93 (Tex. 1957).

¹⁵ *Republic Bank Dallas, N.A. v. Interkal, Inc.*, 691 S.W.2d 605, 607 (Tex. 1985); and *Simmons v. Arnim*, 220 S.W. 66, 70 (Tex. 1920).



In the context of Government Code section 551.021, the Legislature's use of the word "or" indicates that administrative agencies have discretion, option, or alternative between keeping minutes and making a tape recording of open meetings. The statutory provision is not ambiguous. The Legislature's intent is discernable from the wording of the statute. Therefore, TSL&A's rule appears to be in conflict with and effectively nullify the statutory provision.

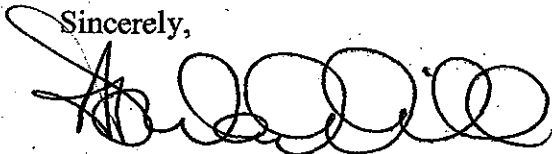
Conclusion

TSL&A's statutory interpretation and rule implementation:

- Ignores Government Code section 551.021, which allows a governmental body make a tape recording of each open meeting of the body in lieu of preparing and keeping minutes;
- Did not fully disclose in its second edition rule proposal that a consequence of its rulemaking was to prohibit state agencies from making a tape recording in lieu of preparing and keeping minutes, as allowed by Government Code section 551.021; and
- Disregards the limitations of TSL&A's authority, thereby circumventing the Legislature's intent to allow governmental bodies to tape record its open meetings in lieu of preparing and keeping minutes.

Your opinion whether the TSL&A may require a state agency to create and maintain *written* minutes of the agency's open meetings, when the requirement does not merely implement but effectively negates statutory provisions, is greatly appreciated.

Sincerely,



Duane Waddill
Executive Director
Texas Residential Construction Commission

cc: Susan Durso
General Counsel

ADW/SKD/ml

