

Law Governing Operation of the Board Role of the Attorney General Representing State Agencies

From: 2014 Administrative Law Handbook, Office of the Attorney General

To State Agency and Local Government Officials, Administrators, Counsels and Staff: Public officers and agencies work hard to serve Texans. In support of the multiple duties required of state and local entities, my office has prepared the 2014 Administrative Law Handbook as a reference tool and guide to three important state statutes. As the 83rd Legislature has now drawn to a close, this 2014 edition provides legislative and judicial updates concerning the Administrative Procedure Act, the Texas Public Information Act and the Texas Open Meetings Act.

The Administrative Procedure Act provides practice and procedure standards for the rules, rates and orders of state agencies that affect the lives of Texas residents in significant ways. The Public Information Act and Open Meetings Act are open government laws that apply to state and local governmental entities and contain important protections for the public.

This Handbook is intended as an aid to understanding the basic protections and requirements of these laws. It is not intended as a substitute for legal advice, but it will explain the fundamental principles of each statute. More detailed guidance on the Public Information Act and Open Meetings Act is also prepared by my office, and these publications are available on the attorney general's website at www.texasattorneygeneral.gov.

We are committed to giving state and local agencies the best possible legal advice and support, and I hope the 2014 Administrative Law Handbook will be a helpful resource to accomplish that goal. Please feel free to contact my office whenever you need legal assistance.

Sincerely,

Greg Abbott
Attorney General of Texas

Table of Contents

LAWS GOVERNING ACTIONS OF STATE BOARDS, COMMISSIONS AND AGENCIES	2
Enabling Statutes	2
The Administrative Procedure Act.....	3
The Texas Open Meetings Act	3
The Texas Public Information Act	3
THE ATTORNEY GENERAL’S ROLE.....	4
Services Provided by the State’s Legal Representative	4
Personal Liability and Representation in Lawsuits.....	4
Attorney General Opinions	6
Open Records Decisions.....	6
The Scope of Legal Services Provided	6
Outside Counsel	7
Endnotes:	7

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 [Texas Optometry Act]. In addition, three other primary Texas laws govern the actions and procedures of state agencies:

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

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

Enabling Statutes

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

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

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

The Administrative Procedure Act

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

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

The Texas Open Meetings Act

The Open Meetings Act, Government Code chapter 551, requires that all governmental bodies, as defined in the Act, must deliberate or take action on public business and policy in a properly posted open meeting unless a closed or executive session is expressly authorized. Seven days' notice, exclusive of the posting date and the meeting date, must precede all meetings of a governmental body having statewide jurisdiction. The Act provides that notice of 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 www.sos.state.tx.us/texreg.

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

The Texas Public Information Act

The Public Information Act, 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 Act 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's decision regarding the applicability of an exception to disclosure.

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.”²²³ Moreover, the Legislature has the authority “to create additional causes of action in favor of the State and entrust their prosecution, whether in the trial or in the appellate courts, solely to the Attorney General.”²²⁴

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.²²⁵

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.²²⁶ The doctrine of sovereign immunity protects the state from suit and liability unless immunity is waived.²²⁷

The legislature has waived the state's immunity in some areas.²²⁸ 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.²²⁹ 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.²³⁰ It is important to note that although the TTCA waives sovereign immunity, it does not waive individual immunities.²³¹

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.²³² In addition, a supervisor who violates this statute is liable for a civil penalty of up to \$15,000.²³³ Unless the legislature has waived sovereign immunity, as it did in the TTCA and the Whistleblower Act, an employee who is sued in an official capacity may rely on sovereign immunity as a defense to liability.

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

Government employees enjoy certain protections from personal liability in lawsuits. One type of protection is the doctrine of official immunity. Government employees are entitled to immunity from suits that arise from the performance of their discretionary duties in good faith as long as they are acting within the scope of their authority.²³⁴ Whether a particular act is covered by official immunity depends on the facts of the individual case.²³⁵ The first element of official immunity should not be at issue in most regulatory cases, because most regulatory decisions necessarily involve the exercise of governmental discretion. The second element requires government employees to show that they reasonably could have believed their conduct to be justified.²³⁶ Finally, the third element requires a government employee to prove that the offending act was taken within the scope of the employee's authority.²³⁷ 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.²³⁸ 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.²³⁹ 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.²⁴⁰ 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.²⁴¹ The state will also indemnify eligible persons for damages awarded against them, up to \$10,000 per single occurrence of damage to property.²⁴² The state will not, however, indemnify persons for amounts covered by insurance, except for damages that exceed statutory indemnification limits. State agencies may buy liability insurance for their officers and executive staff to cover (1) conduct described in § 104.002 relating to negligence, civil rights violations, or hazardous waste manifests and records, or if the attorney general otherwise approves of indemnification and (2) other conduct customarily covered under directors' and officers' liability insurance. Insurance may be bought with state funds to cover a director, officer, member of the governing board, or a member of the executive staff of the agency. The policy must be limited to providing coverage only for liability in excess of the state's liability under TEX. CIV. PRAC. & REM. CODE § 104.003. The insurance policy must have a deductible in

an amount equal to the limits of state liability under § 104.003 (generally \$100,000 per person, \$300,000 per occurrence, and \$10,000 for property damage). The deductible may be lower for an individual's liability.²⁴³

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 \$100,000.²⁴⁴ 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.²⁴⁵ 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.²⁴⁶ The request for legal representation should include copies of the citation or summons and the petition or complaint. Persons eligible for state indemnification also have the right to be co-represented by a private attorney of their choice, at their own expense. As long as a public servant wishes to have state indemnification, the assistant attorney general assigned to the case remains the attorney in charge of the defense. State defendants who choose to retain private co-counsel should inform the Office of the Attorney General of this decision as soon as possible.

Attorney General Opinions

The Texas Constitution provides that the attorney general shall “give legal advice in writing to the governor and other executive officers, when requested by them.”²⁴⁷ An opinion is “advice or a judgment or decision and the legal reasons and principles on which it is based.”²⁴⁸ Requests for opinions must be in writing and should be submitted directly to the Office of the Attorney General, Opinion Committee. A request for an attorney general opinion must come from the head of a state agency, certain elected officials or other statutorily authorized requestors. The Opinion Committee will provide either an informal letter opinion or a formal, published opinion. Questions about specific pending requests should be directed to the assistant attorney general assigned to represent the agency. Formal attorney general opinions as well as open records decisions may be accessed at the attorney general's website at www.texasattorneygeneral.gov.

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 informal letter ruling or a formal, published open records decision. This process is discussed in greater detail later in this Handbook.

The Scope of Legal Services Provided

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

- the availability of staff attorneys or outside counsel to the agency;

- the agency’s need for litigation or non-litigation assistance;
- 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.²⁴⁹ When two state agencies are in conflict in legal proceedings, different assistant attorneys general are assigned so that the legal interests of the two state agencies can be properly represented. In addition, the assistant attorneys general take whatever steps are necessary to maintain their client agencies’ confidences.

Outside Counsel

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

Endnotes:

- 1 TEX. GOV’T CODE §§ 2001.001-.902.
- 2 TEX. GOV’T CODE §§ 551.001-.146.
- 3 TEX. GOV’T CODE §§ 552.001-.353.
- 4 TEX. GOV’T CODE § 2001.003(1).
- 5 TEX. GOV’T CODE § 2001.003(6)(A).
- 223 TEX. CONST. art IV, § 22.
- 224 TEX. CONST. art IV, § 22; *Maud v. Terrell*, 200 S.W. 375, 376 (Tex. 1918); Tex. Att’y Gen. Op. No. JM-791 (1987).
- 225 *Russell v. Edgewood Indep. Sch. Dist.*, 406 S.W.2d 249, 251-52 (Tex. Civ. App.—San Antonio 1966, writ ref’d n.r.e.).
- 226 *Cloud v. McKinney*, 228 S.W.3d 326, 333 (Tex. App.—Austin 2007, no pet.).
- 227 *Lowe v. Tex. Tech Univ.*, 540 S.W.2d 297, 298 (Tex. 1976).
- 228 TEX. CIV. PRAC. & REM. CODE §§ 101.001-.109 (Texas Tort Claims Act); TEX. GOV’T CODE §§ 554.001-.010 (Whistleblower Act).
- 229 TEX. CIV. PRAC. & REM. CODE §§ 101.021, .025.
- 230 TEX. CIV. PRAC. & REM. CODE § 101.023(a).
- 231 TEX. CIV. PRAC. & REM. CODE § 101.026.
- 232 TEX. GOV’T CODE § 554.002. 233 TEX. GOV’T CODE § 554.008.
- 234 *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994).

235 *Kassen v. Hatley*, 887 S.W.2d 4, 12 (Tex. 1994).
236 *Lancaster*, 883 S.W.2d at 656-57.
237 *Lancaster*, 883 S.W.2d at 658.
238 TEX. CIV. PRAC. & REM. CODE §§ 104.001-.008.
239 TEX. CIV. PRAC. & REM. CODE § 104.001.
240 TEX. CIV. PRAC. & REM. CODE § 104.002(a).
241 TEX. CIV. PRAC. & REM. CODE § 104.003(a)(1).
242 TEX. CIV. PRAC. & REM. CODE § 104.003(a)(2).
243 TEX. CIV. PRAC. & REM. CODE §§ 104.003(b), .009.
244 TEX. CIV. PRAC. & REM. CODE § 108.002(a), (b).
245 TEX. CIV. PRAC. & REM. CODE § 104.004.
246 TEX. CIV. PRAC. & REM. CODE § 104.005(2).
247 TEX. CONST. art. IV, § 22.
248 TEX. GOV'T CODE § 402.041.
249 *Pub. Util. Comm'n v. Cofer*, 754 S.W.2d 121, 123 (Tex. 1988).