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SUNSET ADVISORY COMMISSION

P.O. Box 13066 ♦ Austin, Texas 78711-3066

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Boerne

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May 31, 2012

The Honorable Greg Abbott
Attorney General
State of Texas
209 West 14th Street
Austin, TX 78701

Dear Mr. Attorney General:

As Chair of the Sunset Advisory Commission, I respectfully request a formal opinion from you on two legal issues regarding the Sunset Advisory Commission's access to records and meetings of the State Commission on Judicial Conduct. The Sunset Commission relies on unfettered access to records and meetings to perform its statutorily required evaluations of entities that the legislature places under the Sunset Act. As the State Commission on Judicial Conduct has denied the Sunset Commission staff access to certain records and meetings despite the Sunset Act's confidentiality protections, I request your opinion regarding the following questions.

1. Is the staff of the Sunset Advisory Commission, as part of its statutorily required review of the State Commission on Judicial Conduct, entitled to review the confidential records, documents, and files of the State Commission on Judicial Conduct, including documents prepared by State Commission on Judicial Conduct staff attorneys that may be subject to attorney-client privilege?
2. Is the staff of the Sunset Advisory Commission, as part of its review of the State Commission on Judicial Conduct, entitled to attend proceedings of the State Commission on Judicial Conduct, including disciplinary hearings before the State Commission on Judicial Conduct and the State Commission on Judicial Conduct's deliberations in arriving at a decision to take disciplinary action against a judge?

I am submitting the Sunset Commission's brief addressing these questions to you as an attachment to this letter. Thank you in advance for your consideration of this matter. Please do not hesitate to contact me if you need any additional information regarding this request.

Respectfully,

Representative Dennis Bonnen
Chair, Sunset Advisory Commission

Attachment



SUNSET ADVISORY COMMISSION

P.O. Box 13066 ❖ Austin, Texas 78711-3066

BRIEF

House Members

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San Antonio

TO: The Honorable Greg Abbott
Attorney General of Texas

FROM: Representative Dennis Bonnen
Chair, Sunset Advisory Commission

DATE: May 31, 2012

SUBJECT: Sunset Advisory Commission Access to Confidential Records and
Proceedings of the State Commission on Judicial Conduct

Senate Members

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INTRODUCTION

The Sunset Advisory Commission ("Sunset Commission") is currently reviewing the State Commission on Judicial Conduct ("Commission") as part of its biennial review of state agencies for the 83rd Legislature. During the review of the Commission, the staff of the Sunset Commission requested that the Commission allow Sunset Commission staff to attend the Commission's meetings, where the Commission informally hears cases against judges accused of judicial misconduct. As a judicial agency, the Commission is exempt from the requirements of the Open Meetings Act and conducts all of its meetings in closed sessions. The Commission refused to allow Sunset staff to observe any Commission meetings, asserting that the meetings were confidential and privileged under Section 1-a(10), Article V, Texas Constitution, and Section 33.032, Government Code.¹ Sunset staff, recognizing the unique nature of the agency, offered to sign confidentiality agreements, but the Commission asserted that the constitutional confidentiality provisions prevented the Commission from allowing access to Sunset staff, even given the confidentiality protections offered by Section 325.0195, Government Code.

Needing to evaluate the Commission's process for handling complaints against judges and reaching a determination, Sunset staff requested access to records including Commission memoranda prepared by staff attorneys to aid the Commission in reaching its decisions. This request was an effort by Sunset staff to conduct an

¹ Section 33.032(a), Government Code, provides that, with certain exceptions not relevant here, papers filed with and proceedings before the Commission are confidential prior to the filing of formal charges.

analysis without attending Commission meetings. However, the Commission also refused to provide Sunset staff access to these documents, asserting that the documents are confidential or privileged under Section 1-a(10), Article V, Texas Constitution, Rule 503 of the Texas Rules of Evidence, and Section 33.032, Government Code.

Having been denied access to the Commission's meetings and access to key documents in the Commission's internal process, Sunset staff issued its report recommending that the Commission be statutorily required to provide Sunset staff with access to observe its meetings and examine its confidential records.² The Commission objected to this recommendation at the Sunset Commission's public hearing on April 10, 2012, where the Sunset Commission urged the Commission to try to work with Sunset staff or else seek an Attorney General's opinion on whether Sunset staff may have access to the requested materials and meetings. After the April 10 hearing, the Commission continued to deny access to its meetings but decided to request that judges with pending cases waive confidentiality so Sunset staff could attend those hearings, though no judge has yet waived confidentiality. The Commission then provided access to portions of the requested memoranda. However, the Commission provided the memoranda only for cases heard in informal hearings where the judge was willing to waive confidentiality or where the sanction was made public, and it redacted the legal reasoning and recommendations. In reviewing this limited group of redacted documents, Sunset staff found that the material was insufficient to effectively evaluate the Commission as required by the Texas Sunset Act (Chapter 325, Government Code) and that staff would need access to both the unredacted memoranda and the Commission's meetings to evaluate the Commission's disciplinary process. The Commission recently voted to allow Sunset access to unredacted copies of this limited group of memos, but this offer fails to address the underlying concern – that the agency has decided what types of documents that Sunset staff can have full access to, inhibiting the Sunset review process.

The Sunset Commission believes it is entitled to review all records, documents, and files of an agency that is being reviewed by the Sunset Commission under Chapter 325 and to attend any agency meeting.

1. Sunset Advisory Commission's Authority

The Sunset Commission is charged with the duty to review those state agencies that are subject to Chapter 325, Government Code.³ Specifically, Section 325.008(a)(3) of that chapter requires the Sunset Commission to review a state agency "based on the criteria provided in Section 325.011."⁴ According to Section 325.011, the Sunset Commission's review of a state agency must consider:

² See Sunset Advisory Commission, *Staff Report: State Commission on Judicial Conduct*, at 2, 19 (2012).

³ See Section 325.008, Government Code.

⁴ Section 325.008(a)(3), Government Code.

(1) the efficiency and effectiveness with which the agency or the advisory committee operates;

(2)(A) an identification of the mission, goals, and objectives intended for the agency or advisory committee and of the problem or need that the agency or advisory committee was intended to address; and

(B) the extent to which the mission, goals, and objectives have been achieved and the problem or need has been addressed;

...
(4) an assessment of authority of the agency relating to fees, inspections, enforcement, and penalties;

(5) whether less restrictive or alternative methods of performing any function that the agency performs could adequately protect or provide service to the public;

...
(7) the promptness and effectiveness with which the agency addresses complaints concerning entities or other persons affected by the agency, including an assessment of the agency's administrative hearings process;⁵

So that the Sunset Commission can carry out its duties under Chapter 325, the legislature has given it broad access to the records, documents, and files of a state agency being reviewed under Chapter 325,⁶ including confidential records, documents, and files.⁷ In addition, the legislature has imposed a duty on a state agency being reviewed under Chapter 325 to assist the Sunset Commission at its request.⁸

2. Review of the State Commission on Judicial Conduct

The Sunset Advisory Commission's authority to review the State Commission on Judicial Conduct is established in Section 33.003, Government Code. Section 33.003 provides that "[t]he . . . Commission . . . is subject to review under Chapter 325 (Texas Sunset Act), but is not abolished

⁵ Section 325.011, Government Code.

⁶ See Section 325.019(b), Government Code.

⁷ See Section 325.0195(b), Government Code. Although Section 325.0195(b) does not expressly state that the Sunset Commission may access a state agency's confidential records, it is clear that the legislature intended for the Sunset Commission to have access to all records, including confidential records, because Section 325.0195(b) provides that any confidential record the Sunset Commission receives under Chapter 325 or another law remains confidential. In light of the broad authority the legislature gave to the Sunset Commission to inspect the records, documents, and files of any state agency subject to Chapter 325, the addition of Section 325.0195(b) makes it clear that the legislature intended for the Sunset Commission to have access to confidential records.

⁸ Section 325.019(a), Government Code, states, "The commission may request the assistance of state agencies and officers. When assistance is requested, a state agency or officer shall assist the commission."

under that chapter.”⁹ Since the Commission is subject to review under Chapter 325, Government Code, the authority, duties, and procedures in Chapter 325 apply to the review of the Commission, and under Sections 325.019 and 325.0195, the Sunset Commission is entitled to review the records, documents, and files of the Commission, including any confidential records, documents, and files.

3. Access to Confidential Records of the State Commission on Judicial Conduct

A. Confidentiality Under the Constitution

The Commission’s assertion that it may withhold records, documents, and files under Section 1-a(10), Article V, Texas Constitution, is misplaced. Section 1-a(10) provides in relevant part:

(10) All papers filed with and proceedings before the Commission or a Master shall be confidential, unless otherwise provided by law, and the filing of papers with, and the giving of testimony before the Commission or a Master shall be privileged, unless otherwise provided by law. . . .¹⁰

Although the constitution does make papers filed with and proceedings before the Commission “confidential” and makes the filing of papers and giving of testimony “privileged,” it also limits that confidentiality and privilege by expressly allowing the legislature to enact laws that allow access to those papers, proceedings, and testimony. Chapter 325 is such a law. By making the Commission subject to Sunset review under Chapter 325, the legislature intended to give the Sunset Commission access to the confidential and privileged information of the Commission. Part of the Sunset review is to examine “the efficiency and effectiveness with which the [Commission] . . . operates.”¹¹ The Sunset Commission would be significantly limited in its ability to carry out its legislative duty to review an agency if it did not have complete access to all of the agency’s records, documents, files, and proceedings. Therefore, the legislature intended the relevant provisions of Chapter 325, Government Code, as an exception to the constitutionally created confidentiality of the Commission’s records.

⁹ Section 33.003, Government Code. The State Commission on Judicial Conduct is not subject to abolishment under Chapter 325 because the Commission is created by Section 1-a, Article V, Texas Constitution, and therefore could be abolished only by an amendment to the constitution. A constitutional amendment to abolish the State Commission on Judicial Conduct must start as a joint resolution filed in either the house or the senate of the Texas Legislature.

¹⁰ Section 1-a(10), Article V, Texas Constitution.

¹¹ Section 325.011(1), Government Code.

B. Attorney-Client Privilege

The Commission also asserts that it may withhold certain confidential documents under the lawyer-client (attorney-client) privilege as recognized by Rule 503 of the Texas Rules of Evidence.¹² The Commission's assertion, however, conflicts with the reasoning in *Texas Comm'n on Environmental Quality v. Abbott*, 311 S.W.3d 663 (Tex. App.--Austin 2010, pet. denied). That case required the Texas Commission on Environmental Quality (TCEQ) to provide all requested confidential information to an individual legislator, including documents protected by the attorney-client privilege. In *T.C.E.Q. v. Abbott*, the court considered whether the TCEQ was required to provide Senator Shapleigh all of the documents he requested from the TCEQ for legislative purposes under Section 552.008, Government Code, including documents protected by the attorney-client and work product privileges. In analyzing the case, the court looked at the plain meaning of the statute, which requires a governmental body to provide a member of the legislature with the requested public information, "including confidential information,"¹³ if the member states that the information is requested for legislative purposes. The court stated, "There is nothing ambiguous about the phrase 'confidential information.'"¹⁴ The court then noted, "The plain meaning of this phrase includes documents subject to the attorney-client or work-product privileges."¹⁵ In holding that the term "confidential information" was sufficient to include the documents at issue in the case, the court stated:

[I]t is clear that the Texas Legislature, like Congress, intended to maintain for itself a special right of access to confidential governmental information necessary to fulfill its legislative function without overriding the exemptions to required disclosure written into the Texas [public information] act. *See id.*; *see also Terrell v. King*, 118 Tex. 237, 14 S.W.2d 786, 790 (1929) ("[C]onstitutional provisions which commit the legislative function to the two houses are intended to include [the power to investigate] to the end that the function may be effectively exercised."). Authority to pursue investigations and inquiries has long been regarded as an incident of full legislative power. *Terrell*, 14 S.W.2d at 789-90. . . .¹⁶

Although *T.C.E.Q. v. Abbott* involved legislative access to information under the public information law, Chapter 552, Government Code, its reasoning and conclusion are applicable to the

¹² Rule 503 of the Texas Rules of Evidence is a rule of evidence that is applicable in a court of law. That rule does not apply in the Sunset review of a state agency.

¹³ Section 552.008(b), Government Code.

¹⁴ *Texas Comm'n on Environmental Quality v. Abbott*, 311 S.W.3d at 670.

¹⁵ *Id.*

¹⁶ *Id.* at 671.

case at hand.¹⁷ The Sunset Commission's right to access confidential records under Chapter 325 serves a function similar to the right to access confidential information provided by Section 552.008.¹⁸ The Sunset Commission is a legislative agency performing an investigative function for the legislature. In performing its review of state agencies, it is necessary for the Sunset Commission to access confidential records. By providing the Sunset Commission the authority to access confidential government records, the legislature intended to give the Sunset Commission access to information made confidential by the attorney-client privilege.

C. Statutory Confidentiality

The Commission asserts that it may withhold records, documents, and files based on Section 33.032, Government Code. Section 33.032(a) restates, in part, the confidentiality provision of Section 1-a(10), Article V, Texas Constitution. With respect to any records, documents, and files made confidential by Section 33.032(a), the same analysis discussed above with respect to attorney-client privilege applies. Since the legislature intended to give the Sunset Commission access to all confidential government records whether the information is made confidential by court rule or statute, the Texas Sunset Act is an exception to the confidentiality created by Section 33.032(a). The Commission may not withhold information from the Sunset Commission on the basis that the records are confidential.

4. Access to Proceedings of the State Commission on Judicial Conduct

The Sunset Commission seeks to attend the Commission's meetings. These meetings consist mostly of disciplinary hearings before the Commission on complaints filed against a judge. At a disciplinary hearing, a representative from the Commission presents the facts of the case as discovered by the Commission's staff. The Commission members may ask questions of the judge who is the subject of the complaint. Only the judge accused in a complaint (and the judge's legal counsel) appears before the Commission at the hearing. Neither the complainant nor any other witnesses are usually called to appear before the Commission at the disciplinary hearing. After all the evidence is presented, the Commission members deliberate and reach a decision on whether to discipline the judge and on the type of sanction, if any, to assess against the judge.

The Commission has refused to allow Sunset Commission staff to attend any hearings. Unless Sunset Commission staff is allowed to attend the Commission's hearings and observe the Commission members deliberate and reach a final determination in a case, the Sunset Commission

¹⁷ As a legislative agency, the Sunset Advisory Commission is able to obtain confidential information under Section 552.008 from any governmental body that is subject to Chapter 552. However, as a judicial branch agency, the Commission is not subject to Chapter 552.

¹⁸ Both Sections 552.008 and 325.0195 provide that any confidential information received under the statute remains confidential and is excepted from public disclosure.

is not able to adequately complete its review. As previously discussed, the Sunset Commission must consider the criteria established by Section 325.011, Government Code, as part of its review of the Commission. Those criteria include the efficiency and effectiveness with which the Commission operates,¹⁹ the extent to which the Commission's mission, goals, and objectives have been achieved and the problem or need has been addressed,²⁰ whether less restrictive or alternative methods of performing any function the Commission performs could adequately protect or provide service to the public,²¹ and the promptness and effectiveness with which the Commission addresses complaints concerning entities or other persons affected by the Commission, including an assessment of the Commission's administrative hearings process.²² The only way for Sunset Commission staff to be able to properly assess the Commission using these criteria is to attend one or more disciplinary hearings and observe the Commission members' deliberations.

The Commission alleges that it may not allow Sunset Commission staff to attend a hearing because the hearings are confidential and privileged under Section 1-a(10), Article V, Texas Constitution. As discussed above, under Section 1-a(10), the papers filed with and proceedings before the Commission are confidential, and the filing of papers and giving of testimony are privileged, unless otherwise provided by law. As contemplated by the phrase "unless otherwise provided by law," Chapter 325, Government Code, provides an exception to the constitutionally created confidentiality and privilege by giving the Sunset Commission access to confidential (including privileged) records of the agencies reviewed under Chapter 325. Although Chapter 325 does not explicitly authorize the Sunset Commission to attend a meeting of an agency being reviewed, based on the criteria the Sunset Commission must consider when reviewing an agency, it is clear that the legislature contemplated that Sunset staff would attend meetings as part of its review of an agency. If the Commission's interpretation of the constitution and statute were correct, it would negate the legislature's clear intent, i.e., that the Sunset Commission conduct a review of the Commission, applying the criteria provided by the Texas Sunset Act. In addition, the Commission is required to assist the Sunset Commission whenever the Sunset Commission requests assistance.²³ Assistance can include granting access to the Commission's proceedings and any other assistance the Sunset Commission requires.

Additionally, since the Sunset Commission is entitled to review the Commission's confidential records, the policy concerns for keeping the disciplinary hearings confidential are not applicable to the Sunset Commission. The Commission's disciplinary records and hearings are confidential to protect the privacy of the judges who may be falsely accused of wrongdoing or whose actions may constitute only minor violations of the Code of Judicial Conduct that do not

¹⁹ Section 325.011(1), Government Code.

²⁰ Section 325.011(2)(B), Government Code.

²¹ Section 325.011(5), Government Code.

²² Section 325.011(7), Government Code.

²³ Section 325.019(a), Government Code.

The Honorable Greg Abbott
May 31, 2012
Page 8

warrant disciplinary action. As the Texas Sunset Act provides that confidential documents shared with the Commission retain their confidentiality and as Sunset staff maintain confidentiality throughout the Sunset process, judges' privacy would continue to be maintained.

In addition, if the Sunset Commission has access to the confidential records with respect to a judge's disciplinary hearing, it will already have access to the information presented in the hearing. The information that the Sunset Commission will not have from records alone is how the Commission members use the information presented in the hearing to reach a final determination, and understanding that process is an important part of the Sunset Commission's review of the Commission. Past Sunset reviews of agencies have revealed instances where written policies and procedures indicated a fair and well-run administrative proceeding, but actual observation of the proceedings revealed that these policies and procedures were not being followed. Only by attending an agency's meetings and hearings can Sunset staff adequately evaluate an agency against the statutory Sunset criteria.