Cause No. 03-09-00250-CV

IN THE COURT OF APPEALS FOR THE
THIRD DISTRICT OF TEXAS AT AUSTIN

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY,
Appellant,
v.
THE HONORABLE GREG ABBOTT, ATTORNEY GENERAL OF TEXAS,
Appellee.

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY'S BRIEF OF APPELLANT

On Appeal From the 345th Judicial District Court,
Travis County, Texas, Cause No. D-1-GN-08-001855

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STATEMENT OF THE CASE

This is a Texas Public Information Act case with grave separation-of-powers constitutional overtones. A member of the Texas Senate requested documents, including privileged attorney-client communications and attorney work product, from the Texas Commission on Environmental Quality,[1] a state agency. After releasing most of the documents, the agency submitted the attorney documents to the Open Records Division of the Texas Attorney General's Office, which ruled[2] that disclosure of them was required under a subsection in the Public Information Act that purports to give an individual member, agency, or committee of the Legislature special powers to compel turnover of documents. The Texas Commission on Environmental Quality sued to challenge the ruling, arguing that as an executive branch agency, it is protected under the constitutional separation of powers doctrine from this interference by a member of the legislative branch.[3] The Texas Commission on Environmental Quality lost in the trial court[4] and now brings this appeal.

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1. *See* Volume 1 of the Clerk's Record, pages 103-09 (exhibit 1a and exhibit 1b to the Texas Commission on Environmental Quality's motion for summary judgment in the trial court). Copies of the requests are attached to this brief at appendix pages 1-6. (Each page of the appendix has a sequential number at the bottom in the center. The appendix contains a copy of each constitutional and statutory provision cited in this brief [but when general citations to whole chapters are given, they are not included].)

Citations in this brief to the Clerk's Record will be in the form "*xxx* C.R. at *yyy*," in which "*xxx*" will be the volume number and "*yyy*" will be the page number. Often supplemental information — for example, the title of a court filing — describing the referred-to document will be included in parentheses.

2. 1 C.R. at 165 (Open Records Division informal letter ruling number OR2008-06742, May 16, 2008, exhibit 1m to the Texas Commission on Environmental Quality's motion for summary judgment in the trial court [hereinafter referred to as TCEQ's MSJ]). A copy of the informal letter ruling is attached to this brief at appendix pages 7-11.

3. 1 C.R. at 2 (Texas Commission on Environmental Quality's Original Petition).

4. 2 C.R. at 330 (final trial court judgment dated April 15, 2009). A copy of the judgment is attached to this brief at appendix page 12.

ISSUES PRESENTED

Does the Texas Commission on Environmental Quality, being part of our state government's executive branch, and executing a core decisionmaking function with a clear line of connectivity to the Constitution's Conservation Amendment, enjoy protection against the Legislature under the separation of powers doctrine embodied in article II, § 1, of the Texas Constitution? Did the trial court err by declining to recognize constitutional protection for the Texas Commission on Environmental Quality against a single legislator's unduly-interfering demand for disclosure to him of privileged attorney documents?

STATEMENT OF FACTS

I. Basic facts and procedural posture.

In February 2008 the Honorable Eliot Shapleigh, a state senator who was a defendant-intervenor in the trial court and is an appellee here, requested documents from the Texas Commission on Environmental Quality (TCEQ) under the Texas Public Information Act (PIA).[5] He wrote that he wanted the documents pursuant to "the legislative purpose special right of access in [PIA] Section 552.008 . . . ."[6] "Legislative purposes" is a phrase in PIA § 552.008(b).

The TCEQ made available many documents to the Senator but declined to disclose a certain few — its privileged attorney-client communications and attorney work product.[7] It forwarded the non-disclosed documents to the Open Records Division of the Office of Attorney General (ORD) for a ruling.[8] In informal letter ruling number OR2008-06742,[9] the ORD broadly interpreted PIA § 552.008(b) to mandate disclosure. Having followed all statutory prerequisites,[10] the TCEQ sued in district court to challenge the ORD ruling.[11]

5. The Texas Public Information Act is Texas Government Code §§ 552.001-.353. It will be referred to and cited below in the form "PIA § 552.*xxx*."

6. 1 C.R. at 103, 107.

7. 1 C.R. at 93 (Affidavit of Celeste Baker, exhibit 1 to TCEQ's MSJ); *id.* at 171 (Affidavit of Robert Martinez, exhibit 2 to TCEQ's MSJ).

8. 1 C.R. at 93; *id.* at 171.

9. 1 C.R. at 165.

10. Lawyers with the TCEQ timely requested an ORD opinion, citing the statutory bases for nondisclosability, including those related to attorney-client communication and attorney work product. *See* 1 C.R. at 93, 111, 114, 171, 182, 185. Senator Shapleigh was timely notified and was sent copies of the letters that the TCEQ addressed to the Attorney General. *See* 1 C.R. at 112, 131, 192, 196, 200. The TCEQ sued pursuant to PIA § 552.324. *See* 1 C.R. at 2. In accordance with PIA § 552.325(b), the undersigned litigation attorneys for TCEQ notified the requestor, Senator Shapleigh, by certified mail, return receipt requested, of the following: a. the existence of the suit, including the subject matter and cause number of the suit and the court in which the suit is filed; b. the requestor's right to intervene in the suit or to choose to not participate in the suit; c. the fact that the suit is against the Attorney General; and d. the address and phone

Senator Shapleigh intervened as a defendant.[12] He filed a motion for summary judgment.[13] So did the TCEQ.[14] The ORD responded to the TCEQ's motion but did not file its own motion.[15] The trial judge granted Senator Shapleigh's motion and denied the TCEQ's.[16] This appeal followed.[17]

II. Subject of the PIA requests: the TCEQ's execution of its constitutionally derived and statutory duties regarding the controversial Asarco permit renewal application.

The TCEQ by statute "is the agency of this state given primary responsibility for implementing the constitution and laws of the state relating to the conservation of natural resources and the protection of the environment."[18] Exercising this responsibility, it considered and ruled on the application of Asarco for renewal of an air permit that the company was legally required to have as a precondition to operating its copper smelting plant in El Paso, Texas.[19] The information sought by Senator Shapleigh related directly to the agency's work on Asarco's application.[20] On February 13, 2008 — the day before Senator

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number of the Office of the Attorney General. *See* 1 C.R. at 210 (Affidavit of Brian Berwick).

11. 1 C.R. at 2.

12. 1 C.R. at 53.

13. 1 C.R. at 62.

14. 1 C.R. at 74.

15. 1 C.R. at 228.

16. 2 C.R. 330.

17. 2 C.R. 331.

18. TEX. WATER CODE § 5.012; *see also* TEX. CONST. art. XVI, § 59 (the "conservation amendment").

19. *See generally* TEX. HEALTH & SAFETY CODE Ch. 382, especially § 382.002(a) (protection of natural resources).

20. *See* 1 C.R. at 93, 172.

Shapleigh's first PIA request — the TCEQ had granted Asarco's renewal request.[21] This action, which would have allowed Asarco to reopen and operate the smelter subject to many conditions, was controversial.[22] People and entities had been opposing the smelter's reopening for many years. Among them had been Senator Shapleigh, who was, individually, a named party to a contested proceeding on the Asarco application.[23] The proceeding had included an evidentiary hearing at the State Office of Administrative Hearings (SOAH) beginning in about 2005.[24] In early 2006, when the Commission considered SOAH's proposal for decision, he appeared and spoke.[25] At the Commission's February 13, 2008, agenda meeting on the Asarco request, he appeared and addressed the Commissioners.[26] On February 14 and February 19, 2008, when he was an active protestant against the company's application, he made his information requests that led to this lawsuit.[27]

III. The TCEQ, its in-house lawyers, and their privileged writings.

The TCEQ is overseen by three Commissioners.[28] The Commissioners were the ultimate agency decisionmakers concerning Asarco's application.[29]

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21. 1 C.R. at 95. The written order and permit were issued later. *Id.*

22. 1 C.R. at 95, 173, 186.

23. 1 C.R. at 94. *See also* 2 C.R. at 265 (showing the Senator viewed himself as personally affected by the Asarco facility).

24. 1 C.R. at 94, 97-98.

25. 1 C.R. at 116-17.

26. *See* 1 C.R. at 95.

27. 1 C.R. at 103, 107. February 19, 2008, was the official date of the second request. It was dated February 18, 2008, but received after 5:00 PM on that day. *See* 1 C.R. at 172. Senator Shapleigh on April 24, 2008, filed with the TCEQ a Notice of Withdrawal as a party. *See* 1 C.R. at 195, 198.

28. TEX. WATER CODE § 5.052.

29. 1 C.R. at 94.

The three Commissioners employ an Executive Director to conduct the day-to-day management of the agency.[30] The Executive Director was not the ultimate decisionmaker concerning the application.

The agency has two sets of lawyers, each with its own separate set of clients.[31] Lawyers in the Office of General Counsel (OGC) have the three Commissioners as their clients.[32] Lawyers on the Executive Director's staff have the Executive Director and people in his various programs as their clients.[33] Thus, the Commissioners' side of the agency receives communications from its lawyers that are confidential and therefore privileged from disclosure to the Executive Director's side, and vice versa.[34]

Ms. Celeste Baker was the OGC attorney assigned to advise the Commissioners concerning Asarco's permit renewal application for Air Quality Permit No. 20345, the matter out of which Senator Shapleigh's PIA requests arose.[35] It is noteworthy that two other requestors who were not members of the Legislature made requests at about the same time.[36] These two non-legislative requests, taken together, covered all of the documents from the OGC part of the TCEQ that the agency had withheld from Senator Shapleigh and had submitted to the ORD for a ruling.[37] The TCEQ refused to release the documents to the non-

30. TEX. WATER CODE § 5.108.
31. 1 C.R. at 94, 172-73.
32. 1 C.R. at 94, 173.
33. *See* 1 C.R. at 171-73.
34. 1 C.R. at 115.
35. 1 C.R. at 95.
36. 1 C.R. at 99.
37. *See* 1 C.R. at 99, 146, 152, 155, 160.

legislative requestors. The ORD ruled that they were not required to be released, citing PIA §§ 552.107 and 552.103.[38]

The Executive Director's attorneys include those in his Environmental Law Division (ELD), who provide confidential legal analysis, advice, and assistance to their clients, the Executive Director and his staff.[39] Only the second of Senator Shapleigh's two PIA requests (the February 19, 2008, request) was broad enough to encompass documents collected, assembled or maintained on the Executive Director's side of the agency. The Executive Director and/or the ELD made available many documents to Senator Shapleigh but held a few back. An ELD lawyer, Mr. Robert Martinez, submitted the withheld documents to the ORD, asking for a ruling that their disclosure was not required. The submissions cited attorney-client and attorney work product privileges (as well as other bases).[40]

IV. How the documents were handled below.

In its submissions to the ORD, the TCEQ had urged what its Motion For Summary Judgment later labeled (for convenient reference) the "prima facie exceptedness" from forced disclosure of the attorney-client communication and attorney work product documents. In effect it argued that, unless PIA § 552.008(b) required disclosure, the documents by virtue of *other* PIA provisions were legally protected from disclosure.[41] The ORD did not rule on

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38. *See* 1 C.R. at 155 (Open Records Division informal letter ruling number OR2008-06741, May 16, 2008), 160 (Open Records Division informal letter ruling number OR2008-10112, July 25, 2008).

39. 1 C.R. at 171-73.

40. 1 C.R. at 171.

41. 1 C.R. at 119-22, 185-92. It also, of course, contended that the Constitution blocked application of PIA § 552.008(b). *Id.*

prima facie exceptedness, apparently deeming it a moot point because under the ORD view of the matter, PIA § 552.008(b) would validly trump exceptedness from disclosure anyway.[42] Nor did the trial court rule on whether or not the documents are prima facie excepted. The trial court sealed them[43] and admitted them into summary judgment evidence.[44] They are part of the clerk's record on file with the Court of Appeals and are available for the Court to examine in camera.

SUMMARY OF ARGUMENT

A state agency classed in the executive department and thus instrumental in "caus[ing] the laws to be faithfully executed"[45] receives full separation of powers protection against undue legislative-department interference. The TCEQ is part of our government's executive branch, being headed by three full-time, salaried, professional administrators who are appointed by the Governor and subject to confirmation by the Senate. These factors add up to a "constitutional commitment" (to adapt a phrase from relevant caselaw) of the TCEQ's functions to the executive department — a commitment that is more than sufficient to gain the agency the protection of article II, § 1. Moreover, the TCEQ has been statutorily tasked with implementing the constitutional directive in article XVI, § 59, of the Texas Constitution. That section made conservation and development of Texas's natural resources public rights and duties and directed the Legislature to pass appropriate laws. One of the agency's most

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42. 1 C.R. at 165.
43. 2 C.R. at 323 (Agreed Order Allowing Filing of Court Records Under Seal).
44. 2 C.R. at 322 (Agreed Order On Motion For Leave and In Camera Inspection).
45. TEX. CONST. art. IV, § 10.

important conservation functions is to protect the state's air quality through a system of case-by-case prior permitting for facilities whose owners wish to emit air contaminants. The document disclosure demands at issue in this case — by just one legislator, seeking attorney-client communication privilege and attorney work product documents — were attempts to interfere unduly with this core permit-application-consideration function.

Past Attorneys General have written formal opinions in various contexts, saying that the executive department has protection against the legislative under article II, § 1. A recent informal letter ruling of the ORD has protected documents internal to the Office of the Attorney General from a PIA request by a single legislator. The ORD did this even though the documents were generated in connection with a function — issuing formal written opinions to legislative committees — conferred on the Office of the Attorney General (an executive-department agency) by statute rather than directly by the Constitution.

Forced turnover of a TCEQ's attorney-client communication and attorney work product documents under the circumstances of this case would vitiate the policies underlying the ancient and important privilege for confidential communications between attorneys and clients and underlying the attorney work product privilege. These privileges are just as important for government clients as for individuals or non-governmental entities. As read by the ORD, Senator Shapleigh, and the trial court, the PIA would chill free exchanges of viewpoints and advice between agency lawyers and their clients, and chill the generation of written work product by the lawyers — and thus would unduly interfere with the agency's executive

department mission in violation of article II, § 1.[46]

Article II, § 1, of the Texas Constitution was adopted by the people to militate against governmental concentration of power and thus is an important bulwark of personal freedom in our democracy.[47] Senator Shapleigh's position, which the trial court erroneously accepted, would altogether deny separation-of-powers protection for many executive branch agencies, and would deny protection even for most *functions* of the state officials listed in article IV, § 1, of the Constitution, because those functions are not directly listed in the Constitution.

ARGUMENT

I. Standard of review.

This Court reviews the district court's order granting summary judgement de novo.[48] "When conducting a de novo review, the reviewing tribunal exercises its own judgment and redetermines each issue of fact and law."[49] The reviewing court gives no deference to the district court's decision.[50] When both sides move for summary judgment on the same issue,

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46. The Court through a narrowing interpretation of PIA § 552.008(b)'s broad, vague phrase, "including confidential information" could avoid directly ruling on the subsection's constitutionality or not. (The phrase's last two words could cover anything from the unimportant to the sacrosanct.) The subsection could fairly be understood as not sweeping in attorney-client communication and attorney work product documents in the present circumstances. The TCEQ has weighty responsibilities. The Legislature could be understood not to have intended, through mere silence, to allow a single member to play havoc with the effectiveness and fairness of the environmental agency's decisional process. The Court could use a heightened standard of interpretation, finding no mandate for turnover of attorney documents without the Legislature's having cast the mandate in specific and unmistakably clear language. Here, there was no specific and unmistakably clear language.

47. *See, e.g., Morrison v. Olson*, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting) (an important purpose of separation of powers is to preserve individual freedom).

48. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005).

49. *Quick v. City of Austin*, 7 S.W.3d 109, 116 (Tex. 1998).

50. *Id.*

and the district court grants the motion of one party and denies the motion of the other, the reviewing court considers the summary judgment presented by both parties and determines all questions presented.[51] If this Court finds that the district court erred, it must render the judgment that should have been rendered below.[52]

II. The separation of powers doctrine protects the executive branch from the legislative.

Article II, § 1, of the Texas Constitution says,

> The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

The principle summed up in these words contemplates a zone of power for each department that must be kept free of usurpation or undue interference by each other department. Caselaw provides examples of how the lines of protectedness run: the executive branch is protected

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51. *Valence Operating Co.*, 164 S.W.3d at 661.
52. *Id.*

from the judicial;[53] the judicial branch is protected from the executive;[54] the legislative branch is protected from the judicial;[55] and the judicial branch is protected from the legislative.[56]

Does the principle also afford protection for the executive branch from the legislative? *Scoggin v. State*[57] seems to show that the answer is yes. Mr. Scoggin, convicted for transporting intoxicating liquor, contended on appeal that his initial traffic stop, for speeding, was illegal under a penal code provision forbidding officers to make speeding arrests unless at the time of the arrest the officer was wearing a uniform and badge distinguishing him from civilians. The Court of Criminal Appeals rejected his argument, holding that the statute was

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53. Among the many cases so holding are *Smith v. Houston Chem. Servs., Inc.*, 872 S.W.2d 252, 258 (Tex. App.–Austin 1994, writ denied) (trial court lacked authority to render judgment denying permit application; grant or denial of an application is an executive function committed exclusively to agency); *Gerst v. Nixon*, 411 S.W.2d 350 (Tex. 1966) (district court lacked power to redetermine agency decision about public need for a new savings and loan association; granting or withholding of a permit in a statutorily regulated commercial endeavor is an administrative function and because of article II, § 1, cannot be delegated to the judicial branch; the court can only review the method the administrative agency employs in arriving at its decision); *Tex. Dep't of Transp. v. T. Brown Constructors, Inc.*, 947 S.W.2d 655, 659 (Tex. App.–Austin 1997, writ denied) (when courts review agency decisions, separation of powers doctrine insures that discretionary functions delegated to the agencies are not usurped by the judicial branch).

54. *See, e.g.*, *State v. Flag-Redfern Oil Co.*, 852 S.W.2d 480, 483-84 (Tex. 1993) (only courts may adjudicate private parties' controverted property rights; an executive agency like the General Land Office cannot exercise the judicial function); *State Bd. of Ins. v. Betts*, 158 Tex. 83, 308 S.W.2d 846, 851-52 (1958) (article II, § 1, ensured that judges could appoint an attorney for a receiver despite a statute that under one reading gave the board of insurance exclusive power).

55. *See Garcia v. Tex. Instruments, Inc.*, 610 S.W.2d 456, 462-63 (Tex. 1980) (court decision cannot repeal statute, "as such would be an invasion of the legislative field") (not citing article II, § 1, but appearing to be based on it).

56. *See, e.g.*, *Armadillo Bail Bonds v. State*, 802 S.W.2d 237, 241 (Tex. Crim. App. 1990) (superseded by statute in a manner not pertinent to the holding the TCEQ relies upon) (striking down, because of excessive interference by legislative branch in affairs of judicial branch, statute requiring delay of at least 18 months in issuance of final judgment against bail bond company); *Meshell v. State*, 739 S.W.2d 246 (Tex. Crim. App. 1987) (characterizing county attorney as member of judicial department; striking down speedy trial act because through it, the Legislature unduly interfered with county attorney's discretion about timing of case preparation); *see also, e.g.*, *Government Services Ins. Underwriters v. Jones*, 368 S.W.2d 560 (Tex. 1963) (recognizing judiciary's protection against undue legislative interference but finding that statute requiring courts to grant continuances to lawyer-legislators did not unduly interfere).

57. 38 S.W.2d 592 (Tex. Crim. App. 1931).

an unwarranted interference of one department with another, violating article II, § 1.[58] (The *Scoggin* court did not classify the officer involved, who was a county sheriff. The office of sheriff is mentioned in article V, § 23, the judicial article. Functionally, however, sheriffs are executive department officials.[59])

Apart from in *Scoggin*, the question whether article II, § 1, protects an executive branch agency against undue interference by the Legislature does not seem to have been presented to the courts, as far as the undersigned attorneys for the TCEQ have been able to determine.

Past Attorneys General, however, have recognized executive branch protection against the Legislature. In MW-460, a 1982 formal opinion, an Attorney General advised that article II, § 1, blocked the Legislature from going so far as to give legislative committees (by statute) veto power over agency rules adopted — by such agencies as the Texas Aeronautics Commission — pursuant to statutory rulemaking power.[60] After discussing *Railroad Commission v. Shell Oil Company*,[61] which was a seminal case limiting courts, in their review of agency fact finding, to searching for substantial evidence, MW-460 said (with emphasis added to the first quoted sentence and otherwise in the original),

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58. On motion for rehearing, the Court also found the statute violated the constitutional prohibition against suspension of the laws except by the Legislature. *Id.* at 595.

59. *See, e.g., Robertson County v. Wymola*, 17 S.W.3d 334, 341 (Tex. App.–Austin 2000, pet. denied) ("The Sheriff's Department . . . is a part of the executive branch"); *Jones v. State*, 151 Tex. Crim. 519, 523, 209 S.W.2d 613, 616 (1948); *cf. Dupree v. State*, 102 Tex. 451, 119 S.W. 301, 309 (1909) (invalidating statute to extent it purported to confer judicial power on a sheriff; seemingly treating sheriff as executive officer).

60. 2 C.R. at 307 (Tex. Atty. Gen. Op. MW-460, 1982 WL 173784, March 23, 1982). A copy of this document is attached to this brief at appendix pages 13-17.

61. 161 S.W.2d 1022 (Tex. 1942).

> *No less than the courts*, the *legislature* is bound by the constitution. If a discretionary rule-making function delegated to an administrative agency is an *executive* function — as we think it is — it is equally impermissible for the legislature (or one of its committees) to usurp the function.[62]

This passage rested on a not-directly-stated idea of constitutional symmetry, one that deserved then, and still deserves, to be honored because of the symmetry in article II, § 1's text (protecting each department against each other department), and because of the evident intention of the Constitution-drafters (and thus of the people) to safeguard freedom by insuring diffusion of governmental powers.

In 1988, another past Attorney General wrote, in a formal opinion, that

> [A]ny attempt by the legislature to *supervise the implementation of statutes through some means other than the normal legislative process* specified in sections 28 through 40 of article [III] of the Constitution of Texas violates the doctrine of separation of powers.[63]

This opinion described the separation of powers doctrine as a safeguard against encroachment or aggrandizement. It cited five other Attorney General opinions going back to 1942, including a 1988 opinion saying that article II, § 1, limited the power of legislative auditing committees to investigate.[64]

In an informal letter ruling issued about three months before the one that triggered this case, the ORD actually addressed limits on legislative power in a PIA § 552.008(b) context.

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62. Tex. Atty. Gen. Op. MW-460, star page 4.

63. 2 C.R. at 311 (Tex. Atty. Gen. Op. JM-993, 1988 WL 406459, star page 2, December 15, 1988) (emphasis added) (executive agency cannot be overseen by committee that includes officials, like the state auditor, who are appointed by and answerable only to the Legislature without violating separation of powers). A copy of this opinion is attached to this brief at appendix pages 18-22.

64. *See* Tex. Atty. Gen. Op. JM-872, 1988 WL 406185, March 14, 1988. A copy of this opinion is attached to this brief at appendix pages 23-40.

State Representative Jim Dunnam had asked for records internal to the Attorney General's Office itself. The records underlay an earlier formal Attorney General's opinion that the chairs of two House committees had asked for and received. (A statute directs the Attorney General's Office to issue formal opinions to a list of government officials, including "a committee of a house of the legislature."[65]) The Representative Dunnam request, which swept in privileged attorney documents, based its demand on PIA § 552.008(b). The ORD protected the documents of the Office of the Attorney General from disclosure, writing that applying § 552.008(b) to the records concerning the Attorney General's Office's internal opinion-writing deliberations would unduly interfere with the agency's functioning, violating article II, § 1.[66]

A footnote in the very ORD informal letter ruling involved in the present case (the Senator Shapleigh informal letter ruling) appears to be a quiet reference to the reasoning of the informal letter ruling described in the preceding paragraph, the one triggered by the Representative Dunnam request. The footnote said — without giving citations — that § 552.008 is not without limits.[67] Where would limits come from, if not from article II, § 1?

Under the United States Constitution, protection of the executive against the legislative branch is established in, for example, *Immigration and Naturalization Service v. Chadha*,[68] where Congress's effort to retain "one-house veto power" over certain executive branch

65. TEX. GOV'T CODE § 402.042.

66. 2 C.R. at 315 (Open Records Division informal letter ruling number OR2008-02184, dated February 15, 2008). A copy of this ruling is attached to this brief at appendix pages 41-47.

67. 1 C.R. at 167.

68. 462 U.S. 919 (1983).

decisions was invalidated. It is noteworthy that although the United States Constitution has no separation of powers provision, federal court decisions have discerned strong protection of one branch against the others in the document's interstices. In contrast, Texas's Constitution has an explicit provision. This difference should guide our courts toward a state separation of powers doctrine at least as robust as the federal doctrine.

III. Chilling.

PIA § 552.008(b) says, in pertinent part,

> A governmental body on request by an individual member, agency, or committee of the legislature shall provide public information, including confidential information, to the requesting member, agency, or committee for inspection or duplication . . . if the requesting member, agency, or committee states that the public information is requested . . . for legislative purposes.[69]

The senator who made the information requests at issue here invoked this provision and recited the words about legislative purpose. The relatively small amount of material withheld from him was documents in the possession of TCEQ attorneys, Ms. Celeste Baker in the Commissioners' Office of General Counsel (OGC) and Mr. Robert Martinez (and attorneys under him, and their intra-agency clients) in the Executive Director's Office of Legal Services. Ms. Baker, the OGC lawyer, in a letter to the ORD, described examples of the types of documents for which she sought protection:

> Two of the five documents are confidential attorney-client memoranda prepared by me in my position as Assistant General Counsel in the Commission's Office of the General Counsel . . . and delivered to the three Commissioners as confidential attorney-client communications to assist them in their review of the

69. An agency may ask the legislative requestor to sign a confidentiality agreement. *See* PIA § 552.008(b)(1)-(4).

> large amount of materials for the February 13, 2008 open meeting on the ASARCO permit renewal application. The two memoranda contain confidential legal analysis and advice with regard to the ASARCO matter and its issues considered by the Commission during its public meetings on February 8, 2008, and February 13, 2008, when it considered the ASARCO permit renewal application and various related matters.[70]

She described the problems for agency functioning that would be caused by forced turnover of the material. Disclosure "would limit or otherwise negatively impact the future legal advice, analysis, and assistance provided in writing to the Commissioners from the Office of General Counsel."[71] It would "have a chilling effect on the ability of the Commission's Office of General Counsel to provide adequate legal counsel, especially written legal advice, to the Commission in the future."[72]

Mr. Robert Martinez, in the Office of Legal Services, wrote that releasing the information for which the agency sought protection "would inhibit the ability of agency attorneys to engage in the necessary frank and open discussions to prepare for litigation"[73] and "would inhibit the ability of agency attorneys to freely discuss ideas and work with different drafts of documents before deciding on the best way to publicly address agency policy and decisions."[74]

The ORD informal letter ruling challenged in this lawsuit had brushed past the chilling effect (and so, apparently, did the trial court). In contrast, in the informal letter ruling written

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70. 1 C.R. at 119.
71. 1 C.R. at 121.
72. 1 C.R. at 131; *see also id.* at 99.
73. 1 C.R. at 189.
74. 1 C.R. at 191.

three months earlier to protect the Attorney General's *own* internal attorney documents from a disclosure request by Representative Dunnam, the ORD emphasized chilling. It accepted an argument that allowing the legislator to have access

> would necessarily have a chilling effect on the free flow of ideas, frank communications, and robust deliberations necessary to generating an advisory opinion. It would also inhibit attorneys at the [Office of the Attorney General] from rendering candid advice and recommendations to the Attorney General on matters relating to advisory opinions. . . . Thus, the substance and quality of the Attorney General's opinion output would necessarily suffer.[75]

These concerns apply to the TCEQ, and perhaps with even more force, because the environmental agency makes substantive decisions, in contrast with Attorney General opinions, which are advisory.

IV. A more-than-sufficient constitutional commitment.

Senator Shapleigh's motion for summary judgment persuaded the trial court that

> to prove an unconstitutional interference, the TCEQ must prove that Senator Shapleigh's records request interfered with its exercise of a power constitutionally committed to it. Because the TCEQ has no constitutionally-conferred powers, but has only those powers granted it by the Legislature, it cannot prove that Senator Shapleigh's records request interfered with any authority granted to it by the Constitution."[76]

The phrase "constitutionally committed," which comes from article II, § 1, cases,[77] cannot bear the weight the Senator and the trial court put upon it. The TCEQ is in the executive

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75. *See* 2 C.R. 317.

76. 1 C.R. at 62, 67 (Intervenor's [Senator Shapleigh's] Motion For Summary Judgment).

77. *See, e.g., Gov't Serv. Underwriters v. Jones*, 368 S.W.2d 560; *Holmes v. Morales*, 906 S.W.2d 570, 573 (Tex. App.–Austin 1995), *rev'd on other grounds*, 924 S.W.2d 920 (Tex. 1996); and *State Bd. of Ins. v. Betts*, 308 S.W.2d 846. Senator Shapleigh cited these cases below. *See* Brief in Support of Intervenor's [Senator Shapleigh's] Motion For Summary Judgment, 2 C.R. at 267; and Intervenor's [Senator Shapleigh's] Post-Hearing Brief in Support of Motion For Summary Judgment, 2 C.R. at 325.

department,[78] a department headed by the Governor of Texas. By statute he appoints the three Commissioners who oversee the TCEQ,[79] subject to confirmation by the Texas Senate.[80] This classification in the executive branch comprises by itself all the "constitutional commitment" necessary to gain article II, § 1, protection for the agency. Like most Texas agencies, the TCEQ derives its authority from statutes. Yet the TCEQ is instrumental in "caus[ing] the laws to be faithfully executed"[81] (and so are other Texas executive-branch agencies). The fact that (as Senator Shapleigh emphasized below) the Legislature created the TCEQ and may destroy it — *through proper legislative procedures and after veto opportunity by the Governor*[82] — does not mean that an individual member of the Legislature may interfere with its execution of the laws by getting its attorney documents. The Legislature must keep at a respectful distance. If the trial court's judgment in the present case were correct, it would strip article II, § 1, protection from what most people think of as executive department agencies.

Apart from being classified in the executive department and thus being instrumental in the Governor's faithful execution of the laws, the TCEQ's permit-consideration function has a further direct constitutional provenance. The people through article XVI, § 59, of the

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78. *Tex. Nat. Res. Conserv'n Com'n v. IT-Davy*, 74 S.W.3d 849, 858 (Tex. 2002); *Board of Water Engineers v. McKnight*, 111 Tex. 82, 229 S.W. 301, 304 (1921) ("[t]he members of the Board [of Water Engineers] under the [relevant statute are] beyond question of the executive department").

79. TEX. WATER CODE § 5.052(a). The members serve on a full-time basis. *Id.* § 5.057. Each is appointed for a six year term. *Id.* § 5.056.

80. *Id.* § 5.052(a).

81. TEX. CONST. art. IV, § 10.

82. *See* JM-993, cited in note 61, above, and accompanying text (legislature cannot supervise implementation of statutes other than through normal legislative process).

Texas Constitution made conservation and development of Texas's natural resources public rights and duties and directed the Legislature to pass appropriate laws. The Legislature has created the TCEQ and made it the primary agency statutorily tasked with implementing the constitutional directive.[83] The agency protects the air resource (among other ways) through a system of case-by-case prior permitting for facilities whose owners wish to emit air contaminants.[84] These facts buttress the constitutional commitment to the TCEQ of the functions in connection with which agency lawyers wrote or compiled the documents Senator Shapleigh sought. The court below in effect denied the constitutional provenance of the TCEQ's air permitting powers and thus fell into error.

If, as Senator Shapleigh argued and the trial court ruled, the PIA allowed a single legislator to trump privileges, the Legislature would have opened the door to undue interference over the executive department and would have overstepped the constitutional limits on its own powers. Its power is constitutionally exercised only in furtherance of its proper lawmaking authority.

V. Logical conundrums.

The ORD filed no summary judgment motion below. It faces — indeed, it has played a part in creating — a logical conundrum. In the Representative Dunnam informal letter ruling, it found protection for the Attorney General's own internal documents, yet in the

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83. TEX. WATER CODE § 5.012.

84. *See generally* TEX. HEALTH & SAFETY CODE § 382.0518 (a person planning the construction of a new or modified facility that may emit air contaminants must obtain a permit or permit amendment before work is begun).

informal letter ruling that triggered the present case, it forced disclosure by the TCEQ. Senator Shapleigh's own post-hearing briefing points up the fact that there is no meaningful difference between the two cases. The Senator wrote that the

> analysis [in the ORD letter ruling triggered by the Representative Dunnam PIA request] would likely mean that the specific application of the separation-of-powers principle in the . . . letter ruling is flawed. . . . The letter ruling by itself does not state whether the original [formal Attorney General's opinion to the committee chairs] was made pursuant to constitutional or statutory authority, but assuming it was the latter, then the information requested by Representative Dunnam would not have interfered with any constitutional power conferred upon the Attorney General and should have been released under § 552.008.[85]

The formal opinion referred to by the Senator was made pursuant to statutory authority, not constitutional authority (although the ORD did not highlight that fact in its informal letter ruling triggered by the Representative Dunnam request). The Constitution says nothing about the Attorney General's power to write opinions to legislative committees. It speaks (in article IV, § 22) only of advice "to the Governor and other executive officers." *Legislation* — Texas Government Code § 402.042 — expanded the scope of opinion-requesting eligibility, sweeping in legislative committees.

The TCEQ urges that the ORD informal letter ruling triggered by the Representative Dunnam request was correct in protecting the Attorney General's Office's documents, and the ORD should have done the same in the present case. This Court should reject Senator Shapleigh's approach. It should follow the apparent holding of the *Scoggin* case and be guided by the formal Attorney General opinions cited above.

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85. 2 C.R. 325 (Intervenor's [Senator Shapleigh's] Post-Hearing Brief in Support of Motion For Summary Judgment at page 3, note 1).

CONCLUSION AND PRAYER

The TCEQ, because it is in the executive department, because it is instrumental in carrying out the Governor's obligation to cause the laws to be faithfully executed, and because it was carrying out a function with a constitutional provenance in article XVI, § 59, was entitled to protection against incursion by a single legislator on the privileged attorney documents at issue in this case. The trial court erred by granting Senator Shapleigh's motion for summary judgment and denying the TCEQ's motion. The agency asks for reversal and asks the Court to render judgment that the TCEQ's motion for summary judgment is granted and Senator Shapleigh's motion for summary judgment is denied.

Respectfully submitted,

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Attorney General of Texas

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First Assistant Attorney General

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Deputy Attorney General For Civil Litigation

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CERTIFICATE OF SERVICE

On September 8, 2009, I served the above and foregoing on each person on the list below, by the method shown.

Brian E. Berwick

LIST OF PERSONS SERVED

Ms. Brenda Loudermilk (hand delivery and by E-mail) Chief, Open Records Litigation Section Environmental Protection and Administrative Law Division (018) P.O. Box 12548 Austin, Texas 78711-2548 **Attorney for The Honorable Greg Abbott, Attorney General of Texas, defendant-appellee**	Mr. Doug W. Ray and Mr. Randall B. Wood (certified mail, return receipt requested, and by E-mail) RAY, WOOD & BONILLA 2700 Bee Caves Road #200 Austin, Texas 78746 **Attorneys for The Honorable Elliott Shapleigh, Texas Senator, intervenor-appellee**

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PIR#: 08.02.14.08 JH
Agency Recd: 02/14 DUE: 02/29
IR/OR Received: 02/14/08
Lead Office: OLS

The Senate of the State of Texas

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Health and Human Services
Nominations
Transportation and Homeland Security
Veterans Affairs & Military Installations - Vice Chair
Subcommittee on Base Realignment and Closure - Chair
Sunset Advisory Commission

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February 14, 2008

Texas Commission on Environmental Quality
Public Information Officer, MC 197
P.O. Box 13087
Austin, Texas 78711-3087

VIA INTERAGENCY MAIL AND FACSIMILE

Re: Texas Public Information Act Request

To Whom It May Concern:

Per this letter, I submit the following Texas Public Information Act request under the legislative purpose special right of access in Section 552.008 of the Texas Government Code. In considering your responses to this request for documents, please use the following definitions:

"ASARCO" means ASARCO L.L.C.; any predecessor, parent, including but not limited to Grupo Mexico, subsidiary, affiliate, or successor-in-interest to ASARCO L.L.C; and all agents of ASARCO L.L.C., including but not limited to Teresa Montoya and Montoya PR.

"Documents" shall be used in the broadest sense and include, but is not limited to, original and non-identical copies, whether by reason of marginal or other notes or alterations, and means, without limitation, the following items, whether printed or recorded or produced by other mechanical or electronic process, or written or produced by hand: agreements, communications, including inter-company and intra-company communications, email, state and federal governmental hearings and reports, correspondence, telegraphs or books, summaries, records of personal conversations or interviews, bulletins, notices, diaries, graphs, charts, maps, blueprints, diagrams, reports, notebooks, note charts, plans, surveys, plats, calculations, drawings, sketches, indices, pictures, audio or visual recordings, tapes, transcripts, printouts of internet sites, accounts, invoices, analytical records, summaries and/or records of meetings, conferences, telephone calls or negotiations, telephone message logs, calendars, day-timers, schedules, opinions or reports of consultants, appraisals, reports or summaries of negotiations, photographs, motion picture film, brochures, pamphlets, advertisements, circulars, advertising literature, press releases, drafts, letters, projections, working papers, check (front and back), check stubs, receipts, and other papers or writings of any character or description, including but

not limited to, any information contained in any computer or information-retrievable devices, including but not limited to electronic mail, any marginal comments appearing on any document, and other writings, including mass-mailings to customers and/or competitors.

"TCEQ" means the Texas Commission on Environmental Quality, including including, Commissioners Buddy Garcia, Larry R. Soward, and Bryan W. Shaw and their respective staff; TCEQ Executive Director Glenn Shankle and his staff; and all other agency staff.

Please provide me with the following information:

1. All versions, whether draft or final, of the order that was read by Chairman Buddy Garcia at the end of the February 13, 2008 hearing on ASARCO's application for renewal of Air Quality Permit No. 20345.

2. A list of all persons, both inside and outside of TCEQ, who had access to, viewed, or received emailed or hard copies of any version of the order referenced in item number one, *supra*. Include the following information for each such person: name, employer, address, business telephone, cell phone, and email address.

3. Since February 8, 2006, all calendar entries for TCEQ Commissioners and/or their staff members showing meetings with ASARCO or ASARCO representatives, including but not limited to ASARCO attorneys and lobbyists including Cliff Johnson.

4. All documents from meetings referenced in item number three, *supra*.

5. Since February 8, 2006, all telephone records, including business, public, and private cell phones, indicating communication between TCEQ Commissioners and/or their staff members and ASARCO or ASARCO representatives, including but not limited to ASARCO attorneys and lobbyists including Cliff Johnson.

6. Since February 8, 2006, all emails, letters, written messages, voice mails, or other correspondence between TCEQ Commissioners and/or their staff members and ASARCO or ASARCO representatives, including but not limited to ASARCO attorneys and lobbyists including Cliff Johnson.

7. Since February 8, 2006, all emails, letters, written messages, voice mails, or other correspondence between TCEQ and Governor Rick Perry and/or his staff members regarding ASARCO.

8. Any records indicating destruction of documents that might otherwise be responsive to this Public Information request.

If both electronic and paper versions of responsive documents are available, we prefer electronic copies. In the event that my request is denied in whole or in part, please justify all deletions by reference to specific exemptions of the Act. Please note that I expect you to release all nonexempt portions of otherwise exempt material. Please contact David Edmonson at (512)

463-0129 if you need any additional information. Note that under Section 552.351 of the Texas Government Code, it is a criminal offense if a person willfully destroys, mutilates, removes without permission, or alters public information. I look forward to your response within the time constraints prescribed by the Act.

Very truly yours,

Eliot Shapleigh

Eliot Shapleigh

ES/de

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** TOTAL PAGE.04 **

The Senate of the State of Texas

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February 18, 2008

Texas Commission on Environmental Quality
Public Information Officer, MC 197
P.O. Box 13087
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VIA INTERAGENCY MAIL AND FACSIMILE

Re: Texas Public Information Act Request

To Whom It May Concern:

Per this letter, I submit the following Texas Public Information Act request under the legislative purpose special right of access in Section 552.008 of the Texas Government Code. In considering your responses to this request for documents, please use the following definitions:

"ASARCO" means ASARCO L.L.C.; any predecessor, parent, including but not limited to Grupo Mexico, subsidiary, affiliate, or successor-in-interest to ASARCO L.L.C; and all agents of ASARCO L.L.C., including but not limited to Teresa Montoya and Montoya PR.

"Documents" shall be used in the broadest sense and include, but is not limited to, original and non-identical copies, whether by reason of marginal or other notes or alterations, and means, without limitation, the following items, whether printed or recorded or produced by other mechanical or electronic process, or written or produced by hand: agreements, communications, including inter-company and intra-company communications, email, state and federal governmental hearings and reports, correspondence, telegraphs or books, summaries, records of personal conversations or interviews, bulletins, notices, diaries, graphs, charts, maps, blueprints, diagrams, reports, notebooks, note charts, plans, surveys, plats, calculations, drawings, sketches, indices, pictures, audio or visual recordings, tapes, transcripts, printouts of internet sites, accounts, invoices, analytical records, summaries and/or records of meetings, conferences, telephone calls or negotiations, telephone message logs, calendars, day-timers, schedules, opinions or reports of consultants, appraisals, reports or summaries of negotiations, photographs, motion picture film, brochures, pamphlets, advertisements, circulars, advertising literature, press releases, drafts, letters, projections, working papers, check (front and back), check stubs, receipts, and other papers or writings of any character or description, including but

not limited to, any information contained in any computer or information-retrievable devices, including but not limited to electronic mail, any marginal comments appearing on any document, and other writings, including mass-mailings to customers and/or competitors.

"TCEQ" means the Texas Commission on Environmental Quality, including Commissioners Buddy Garcia, Larry R. Soward, and Bryan W. Shaw and their respective staff; TCEQ Executive Director Glenn Shankle and his staff; and all other agency staff.

Please provide me with the following information:

1. All documents related to any version, whether draft or final, of the order that was read by Chairman Buddy Garcia at the end of the February 13, 2008 hearing on ASARCO's application for renewal of Air Quality Permit No. 20345.

2. All versions, whether draft or final, of any document that was read by Chairman Buddy Garcia during the February 13, 2008 hearing on ASARCO's application for renewal of Air Quality Permit No. 20345, and any documents related to those documents.

3. Since February 8, 2006, all internal TCEQ correspondence regarding ASARCO's application for renewal of Air Quality Permit No. 20345.

4. Since February 8, 2006, all correspondence between TCEQ and Governor Rick Perry and/or his staff regarding ASARCO's application for renewal of Air Quality Permit No. 20345.

If both electronic and paper versions of responsive documents are available, we prefer electronic copies. In the event that my request is denied in whole or in part, please justify all deletions by reference to specific exemptions of the Act. Please note that I expect you to release all nonexempt portions of otherwise exempt material. Please contact David Edmonson at (512) 463-0129 if you need any additional information.

Note that under Section 552.351 of the Texas Government Code, it is a criminal offense if a person willfully destroys, mutilates, removes without permission, or alters public information.

Further note that I have included for your review Texas Attorney General Greg Abbott's 2003 Open Record Letter ruling number 1890, which states, *inter alia*, that personal cellular, personal office, and home telephone records, as well as the e-mail correspondence from personal e-mail accounts of public officials that relate to the transaction of official business are subject to disclosure under the Texas Public Information Act.

I look forward to your response within the time constraints prescribed by the Act.

Very truly yours,

Eliot Shapleigh

Eliot Shapleigh

ES/de

Enclosure

SG\Environmental Quality, Texas Commission on\ShapleiG TPIA 2-18-08.doc

ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

May 16, 2008

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OR2008-06742

Dear Ms. Baker and Mr. Martinez:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 308993.

The Texas Commission on Environmental Quality (the "commission") received two requests from Senator Eliot Shapleigh for information pertaining to a specified air quality permit renewal. The commission's Office of the General Counsel (the "OGC") and its Environmental Law Division (the "division") have submitted separate briefs as well as separate documents that each seeks to withhold. The OGC and the division state that they will provide some of the requested information to the requestor. The OGC claims that the information it has submitted is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code.[1] The division claims that the information

[1]Although the OGC raises section 552.101 of the Government Code in conjunction with Rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Thus, we will not address OGC's claim that the submitted information is confidential under section 552.101 in conjunction with either of these rules.

it has submitted is excepted from disclosure under sections 552.103, 552.107, and 552.111. We have considered the submitted arguments and reviewed the submitted information. We have also received and considered comments from an attorney representing the requestor. *See* Gov't Code § 552.304 (allowing interested party to submit comments indicating why requested information should or should not be released).

We note that the requestor in this instance, Senator Eliot Shapleigh, is a member of the State Legislature. Section 552.008 of the Government Code grants access to information, including confidential information, requested by individual members, agencies, or committees of the Texas Legislature, and provides as follows:

> (a) This chapter does not grant authority to withhold information from individual members, agencies, or committees of the legislature to use for legislative purposes.
>
> (b) A governmental body on request by an individual member, agency, or committee of the legislature shall provide public information, including confidential information, to the requesting member, agency, or committee for inspection or duplication in accordance with this chapter if the requesting member, agency or committee states that the public information is requested under this chapter for legislative purposes. A governmental body, by providing public information under this section that is confidential or otherwise excepted from required disclosure under law, does not waive or affect the confidentiality of the information for purposes of state or federal law or waive the right to assert exceptions to required disclosure of the information in the future. The governmental body may require the requesting individual member of the legislature, the requesting legislative agency or committee, or the members or employees of the requesting entity who will view or handle information that is received under this section and that is confidential under law to sign a confidentiality agreement that covers the information and requires that:
>
> > (1) the information not be disclosed outside the requesting entity, or within the requesting entity for purposes other than the purpose for which it was received;
> >
> > (2) the information be labeled as confidential;
> >
> > (3) the information be kept securely; or
> >
> > (4) the number of copies made of the information or the notes taken from the information that implicate the confidential nature of the information be controlled, with all copies or notes that are not destroyed or returned to the governmental body remaining confidential and subject to the confidentiality agreement.

> (c) This section does not affect:
>
> (1) the right of an individual member, agency, or committee of the legislature to obtain information from a governmental body under other law, including under the rules of either house of the legislature;
>
> (2) the procedures under which the information is obtained under other law; or
>
> (3) the use that may be made of the information obtained under other law.

Gov't Code § 552.008. In this instance, Senator Shapleigh has informed both the commission and this office that he requested the information at issue for legislative purposes. Although the commission argues that the release of the submitted information to Senator Shapleigh would raise separation of powers issues and "disturb the effective separation of powers because the legislative function would be in the position to interfere with the judicial and executive functions," the commission has failed to sufficiently demonstrate that such interference is present in the instant case. The OGC also asserts that section 552.008(c) allows a governmental body to withhold information from a legislator if it is confidential under "other law" outside of the Act. We disagree. Although section 552.008(c) recognizes that a legislator may have access to information under "other law," it does not limit a legislator's access to confidential information under section 552.008(b). Thus, we conclude that the commission must provide the submitted information to Senator Shapleigh in accordance with section 552.008 of the Government Code. *See* Gov't Code § 552.008(b). We note that the release of the submitted information under section 552.008 does not waive or affect the confidentiality of the information for purposes of state or federal law or waive the commission's right to assert exceptions to required public disclosure of this information in the future. *See id; see also* Gov't Code § 552.352. Because we make our determination under section 552.008, we need not address the commission's arguments.[2]

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must file suit in

[2]We note that section 552.008 is not without limits. Because Senator Shapleigh informs us, and provides evidence showing, that he has withdrawn as a party to the underlying contested case, we do not address whether a legislator who is a party to litigation involving a governmental body from whom information is requested is entitled to unlimited access under section 552.008.

Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

Justin D. Gordon
Assistant Attorney General
Open Records Division

JDG/jh

Ref: ID# 308993

Enc. Submitted documents

c: Senator Eliot Shapleigh
The Senate of The State of Texas
800 Wyoming Avenue, Suite A
El Paso, Texas 79902
(w/o enclosures)

Mr. Randall B. Wood
Attorney for Senator Eliot Shapleigh
Ray, Wood & Bonilla
2700 Bee Caves Road
Austin, Texas 78746
(w/o enclosures)

CAUSE NO. D-1-GN-08-001855

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY, Plaintiff	§	IN THE DISTRICT COURT
v.	§	TRAVIS COUNTY, TEXAS
THE HONORABLE GREG ABBOTT, ATTORNEY GENERAL OF TEXAS, Defendant	§	345TH JUDICIAL DISTRICT

FINAL JUDGMENT

On this day the Court heard and considered Plaintiff's Motion for Summary Judgment and Intervenor's Motion for Summary Judgment. All parties appeared through their counsel of record. After considering their Motions, the summary judgment evidence on file and argument of counsel:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion for Summary Judgment is hereby DENIED and Intervenor's Motion for Summary Judgment is hereby GRANTED.

This judgment disposes of all claims by all parties and is final and appealable. Each party shall bear its own costs.

Dated: April 15, 2009.

HONORABLE SCOTT JENKINS

F:\clients\08513\Final Judgment

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APPROVED AS TO FORM ONLY
Brian E. Berwick
ATTORNEY FOR INTERVENOR

Douglas D. Ray
Assistant Attorney General

B. Lowderville
Brenda Lowderville
SBN 12585600

Westlaw

Tex. Atty. Gen. Op. MW-460, 1982 WL 173784 (Tex.A.G.)

Tex. Atty. Gen. Op. MW-460, 1982 WL 173784 (Tex.A.G.)

Office of the Attorney General
State of Texas

Opinion No. MW–460

March 23, 1982

Re: Validity of legislation authorizing a legislative committee to veto or repeal administrative rules

Honorable Ray Farabee
Chairman
State Affairs Committee
Texas State Senate
Room 411, Archives Building
Austin, Texas 78711

Dear Senator Farabee:

Your letter to this office reads in part:

> As Chairman, Senate State Affairs Committee, I hereby respectfully request your opinion . . . concerning the application and interpretation of article II, section 1, and article III, sections 28 through 40, of the Texas Constitution with respect to the authority of the legislature to delegate to legislative committees to power to nullify rules proposed by agencies in the executive branch of government.

The Sixty-seventh Legislature passed, and the governor signed, several acts containing the following language (or words of the same import):

> If the appropriate standing committees of both houses of the legislature acting under Section 5(g), Administrative Procedure and Texas Register Act, as amended (Article 6252–13a, Vernon's Texas Civil Statutes), transmit to the board statements opposing adoption of a rule under that subsection, the rule may not take effect or, if the rule has already taken effect, the rule is repealed effective on the date the board receives the committee's statements.

It is the validity of this language, now included in the enabling acts of several state agencies, that you question. See V.T.C.S., art. 46c–4(c) (Aeronautics Commission); art. 3271a, § 8(d) (State Board of Registration for Professional Engineers); art. 4413 (29cc), § 6(f) (Polygraph Examiners Board); art. 4512b, § 4(c) (Texas Board of Chiropractic Examiners); art. 4512e, § 3e (Texas Board of Physical Therapy Examiners); art. 4528c, § 5(r) (Board of Vocational Nurse Examiners); art. 4552–2.14, (b)

(Texas Optometry Board); art. 4551d, 3(b) (Texas State Board of Dental Examiners); art. 4568(j) (State Board of Podiatry Examiners); art. 5931–5, (10) (National Guard Armory Board); art. 6243–101, § 4(c) (Texas State Board of Plumbing Examiners); art. 7465a, § 8(c) (Texas State Board of Veterinary Medical Examiners).

The language under examination purports to lodge in legislative committees established pursuant to section 5(g) of the Administrative Procedure and Texas Register Act (APTRA), article 6252–13a, V.T.C.S., the power to veto or repeal any rule promulgated by the administrative agency affected. That APTRA subsection, added in 1977, provides:

> Each house of the legislature shall adopt rules establishing a process under which the presiding officer of each house shall refer each proposed agency rule to the appropriate standing committee for review prior to adoption of the rule. When an agency files notice of a proposed rule with the secretary of state pursuant to Subsection (a) of this section, if shall also deliver a copy of the notice to the lieutenant governor and the speaker. On the vote of a majority of its members, a standing committee may transmit to the agency a statement supporting or opposing adoption of a proposed rule.

***2** See V.T.C.S. art. 6252–13a, § 5(g). We note that an agency proposing rules if also required to give notice to the public and invite comment from 'any interested person.' V.T.C.S. art. 6252–13a, § 5(a)(6).

There is no constitutional provision, state or federal, which precludes commentary or expressions of approval or disapproval by a legislative committee addressed to an administrative body contemplating the adoption of a rule or regulation, and the validity of section 5(g) of article 6252–13a, the Administrative Procedure and Texas Register Act, has not been questioned. See Terrell v. King, 14 S.W.2d 786 (Tex. 1929). Your question reaches only the power of such committees to nullify agency rule proposals or adopted agency rules.

We consider first the repeal of agency rules that have veen already adopted and put into effect. In legal theory, the legislative power vested in the legislature by article III, section 1 of the constitution must be exercised by it alone. However, many powers have been properly delegated by the legislature to administrative agencies. See generally 12 Tex. Jur. 3d Constitutional Law § 73 et seq., at 599. Among them has been the power to make rules having the force and effect of law. See generally 2 Tex. Jur. 3d Administrative Law § 16 et seq., at 208.

Valid rules promulgated by an administrative agency acting within its statutory authority have the force and effect of legislation. Lewis v. Jacksonville Building and Loan Association, 540 S.W.2d 307 (Tex. 1976). And a rule promulgated by an administrative agency acting within its delegated authority should be considered under the same principles as if it were the act of the legislature. Texas Liquor Control Board v. Attic Club, Inc., 457 S.W.2d 41 (Tex. 1970). Nevertheless, when such rulemaking power is vested in an agency of the state, it is regarded as an incident of the executive power to administer laws enacted by the legislature, and not as a power to enact laws. It is held that an act of the legislature that is complete and comprehensive in itself and which confers upon an agency authority only to establish rules, regulations and minimum standards to reasonably carry out the expressed purposes of the legislature's act does not make a cuonstitutionally forbidden delegation of legislative power. Oxford v. Hill, 558 S.W.2d 557 (Tex. Civ. App.—Austin 1977, writ ref'd). It confers

only the power to efficiently administer the complete law already established by the legislature. See Ex parte Granviel, 561 S.W.2d 503 (Tex. Crim. App. 1978). Cf. Lone Star Gas Company v. State, 153 S.W.2d 681 (Tex. 1941) (delegated power to fix rates is legislative power).

Thus, a conclusion that the language under scrutiny is unconstitutional might be rested on the ground that it attempts to confer upon members of the legislative branch of government an executive power to efficiently administer laws enacted by the legislature. Section one of article II of the Texas Constitution provides for the separation of governmental powers. It reads:

> *3 The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confined to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

It was held in Ex parte Youngblood, 251 S.W. 509 (Tex. Crim. App. 1923), that when a power conferred by the constitution upon the legislature or either branch thereof is in turn conferred by the constitutionally designated legislative body upon a committee composed of members of the house and senate, the committee is a 'collection of persons' within the inhibition of the foregoing constitutional provision—and one to which non-legislative powers cannot be delegated. See also Walker v. Baker, 196 S.W.2d 324 (Tex. 1946); Attorney General Opinions V–1254 (1951); O–4609 (1942). See also Anderson v. Lamm, 579 P.2d 620 (Colo. 1978); In re Opinion of the Justices to the Governor, 341 N.E.2d 254 (Mass. 1976); Bramlette v. Stringer, 195 S.E. 257 (So. Car. 1938); People v. Tremaine, 168 N.E. 817 (N.Y. 1929).

But the provisions authorizing legislative committees to repeal adopted agency rules are unconstitutional even if the power conferred could be said to be purely legislative in character. It was held in Parks v. West, 111 S.W. 726 (Tex. 1908), and reiterated in Walker v. Baker, supra, that where the constitution gives a power and prescribes the means by which or the manner in which it is to be exercised, such means or manner is exclusive of all others. Article III, section 1 of the constitution vests the legislative power of the state 'in a Senate and House of Representatives, which together shall be styled 'The Legislature of the State of Texas.'' Sections 29 through 40 of that article detail at great length the manner in which the legislature must exercise its right to legislate. The means by which the legislature is to accomplish the enactment of laws being expressly provided by the constitution, any authority for the legislature to exercise that right in a different mode is excluded. See Walker v. Baker, supra; American Indemnity Company v. City of Austin, 246 S.W. 1019 (Tex. 1922).

The legislature is compelled to follow those procedures in the enactment of all laws, including repeals, unless the constitution itself provides exceptions thereto. It takes a law to repeal a law, and the act which destroys should be of equal dignity with that which establishes. City of Hutchins v. Prasifka, 450 S.W.2d 829 (Tex. 1970); City of San Antonio v. Micklejohn, 33 S.W. 735 (Tex. 1895); J. D. Abrams, Inc. v. Sebastian, 570 S.W.2d 81 (Tex. Civ. App.—El Paso, 1978, writ ref'd n.r.e.). Inasmuch as the legislature is empowered to establish a law only by following the aforesaid constitutional procedures, and cannot do so by delegating that task to a legislative committee, it cannot effect the repeal of a subsisting law—as augmented by a properly adopted administrative rule—except in the same manner. See State v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980).

*4 Turning to the authorization for such committees to veto proposed rules, we reach the same result for essentially the same reasons. The power to control or correct Decisions committed to administrators by law is an executive function. Walker v. Baker supra. The legislature, of course, may in the first instance severely restrict the discretion of executive officers or administrators to make rules by so thoroughly detailing legislation before it leaves its hands that little or no room is left for administrative interpretation. See Fire Department of City of Fort Worth v. City of Fort Worth, 217 S.W.2d 664 (Tex. 1949); Letter Advisory No. 2 (1973). And by the proper exercise of its law-making powers the legislature may supercede or repeal any agency rule or Decision that has acquired the force and effect of law. But when a statute commits to an administrative agency's hands the power to promulgate rules in order to better administer the legislative policy embodied therein, neither the legislature nor one of its committees may exercise a continuing ad hoc veto over the executive discretion thus reposed. Tex. Const. art. II, § 1.

In Railroad Commission v. Shell Oil Company, 161 S.W.2d 1022 (Tex. 1942), at 1029, the Texas Supreme Court observed that where the legislature has seen fit to vest in an administrative agency the authority to exercise sound judgment and discretion in a particular matter, the courts could not usurp the powers committed to the agency or undertake to exercise the agency's judgment and discretion for it. See also Denison v. State, 61 S.W.2d 1017 (Tex. Civ. App.—Austin), writ ref'd per curiam, 61 S.W.2d 1022 (Tex. 1933). No less than the courts, the legislature is bound by the constitution. If a discretionary rule-making function delegated to an administrative agency is an executive function—as we think it is—it is equally impermissible for the legislature (or one of its committees) to usurp the function. Tex. Const. art. II, § 1; Walker v. Baker, supra; Ex parte Youngblood, supra; Attorney General Opinions V–1254 (1951); O–4609 (1942). See State v. Legislative Finance Committee, et al, 543 P.2d 1317 (Mont. 1975). See also Anderson v. Lamm, supra; In re Opinion of the Justices to the Governor, supra.

The foregoing conclusion is not inconsistent with the case of Jessen Associates, Inc. v. Bullock, 531 S.W.2d 593 (Tex. 1975), in which the Texas Supreme Court concluded that a rider to the General Appropriations Act supplied 'legislative approval' to certain projects without the consent of the College Coordinating Board. In the Jessen Associates case the supreme court held that the legislature had fully complied with the procedural requirements of the constitution and properly exercised its law-making powers while doing so. There was no attempt there to usurp an executive function. A proper and complete legislative act legitimately restricted the discretion allowed administrative officers. Moreover, the court in Jessen Associates did not have before it the question of separation of powers.

*5 We conclude that it is constitutionally impermissible for the legislature to delegate to legislative committees the power to nullify rules proposed or adopted by agencies in the executive branch of government. As a matter of interest we note that a constitutional amendment which would have expressly allowed a delegation of such power to legislative committees was proposed in 1979 but defeated by the people. See H.J.R. No. 133, Acts 1979, 66th Leg., at 3232.

SUMMARY

It is constitutionally impermissible for the legislature to delegate to legislative committees the power to nullify rules proposed or adopted by agencies in the executive branch of government.

Very truly yours,
Mark White
Attorney General of Texas

John W. Fainter, Jr.
First Assistant Attorney General

Richard E. Gray III
Executive Assistant Attorney General

Prepared by
Bruce Youngblood
Assistant Attorney General

APPROVED:

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Tex. Atty. Gen. Op. MW-460, 1982 WL 173784 (Tex.A.G.)
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Tex. Atty. Gen. Op. JM-993, 1988 WL 406459 (Tex.A.G.)

Tex. Atty. Gen. Op. JM-993, 1988 WL 406459 (Tex.A.G.)

Office of the Attorney General
State of Texas

Opinion No. JM–993

December 15, 1988

Re: Authority of the Productivity Bonus Commission created by article 6252–29, V.T.C.S. (RQ–1459)

Honorable Robert E. Davis
Chairman
Productivity Bonus Commission
P.O. Box 12428, Capitol Station
Austin, Texas 78711

Dear Mr. Davis:

You ask a number of questions concerning the Productivity Bonus Commission, article 6252–29, V.T.C.S. We will first describe the Commission and highlight its key functions before discussing each of your questions.

The Commission is charged with administering a program designed to produce savings for the taxpayers by reducing the operating costs of state agencies through the improvement of productivity by means of techniques specified in the statute. See generally V.T.C.S. art. 6252–29, § 6. The Commission is composed of the comptroller of public accounts, the State Auditor, the director of the Legislative Budget Board, a member of the governor's staff, the classification officer appointed under the Position Classification Act of 1961 (art. 6252–11, V.T.C.S.), an officer or employee of a political subdivision of the state, and three persons from private industry who have experience in the administration of incentive pay programs. V.T.C.S. art. 6252–29, § 2(a).

State agencies in the executive and judicial branches of the government, with the exception of the governor's office and institutions of higher education, may elect to participate in the program outlined in the statute by submitting a plan that "outlines a strategy ... that, if implemented, would cause the agency ... to qualify for a productivity bonus." Id. § 4(a). The Act contains detailed instructions and criteria for the Commission to use in determining whether an agency plan produces cost savings in its yearly operations which qualify for a productivity bonus. Id. §§ 5 and 6. Bonuses actually awarded are

presented to employees of the agency and result in an increase of the funds available to the agency for its operations during a subsequent fiscal year. Id. § 9. A portion of any cost savings accrued through increased productivity is to be returned to the fund in the treasury from which the agency receives appropriations. Id.

Finally,

> [i]t is the intent of the legislature that a state agency or a division of an agency that reduces its cost of operations and qualifies for a productivity bonus ... may not be penalized for those savings through a corresponding reduction in appropriations for the subsequent fiscal biennium.

V.T.C.S. art. 6252–29, § 9(e).

You first ask whether the Productivity Bonus Act grants powers of the executive branch to the Productivity Bonus Commission.

The Productivity Bonus Commission is charged with very specific duties involving the execution of a detailed legislative mandate. See, e.g., V.T.C.S. art. 6252–29, §§ 7 and 8. Its executive powers are neither few nor de minimis. See Attorney General Opinion JM–141 (1984). The legislature has expressly conferred authority upon the Commission to execute the law and to determine the manner in which appropriated funds are expended. It also has those powers which are necessarily implied from the express grant of authority. Railroad Commission of Texas v. Red Arrow Freight Lines, Inc., 96 S.W.2d 735 (Tex.Civ.App.—Austin 1936, writ ref'd). The powers of the Commission thus are wholly executive—they will be used not for ceremonial or advisory purposes, but to execute the law and provide for the disbursement of appropriated funds in a pattern selected by the Commission.

***2** You next ask:

> If the Commission is an executive agency, does the composition of the Commission—the presence of members of the legislative branch—violate the doctrine of separation of powers?

Article II, § 1 of the Texas Constitution provides for the separation of powers between the executive, legislative, and judicial branches.

> The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted. (Emphasis added.)

Tex. Const. art. II, § 1.

The doctrine of separation of powers serves as a "self-executing safeguard against the encroachment or aggrandizement of one branch [of government] at the expense of the other." Buckley v. Valeo, 424 U.S. 1, 122 (1976). "No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty." Madison, The Federalist No. 47, p. 324 (Cooke ed. 1961). "The purpose of separation and equilibration of powers in general ... [is] not merely to assure effective government but to preserve individual freedom." Morrison v. Olson, 108 S.Ct. 2597, 2637

(1988) (per the dissenting opinion of Justice Scalia). See also "Separation of Powers," 4 Encyclopedia of the American Constitution 1659 (1986).

This office has consistently held that any attempt by the legislature to supervise the implementation of statutes through some means other than the normal legislative process specified in sections 28 through 40 of article II of the Constitution of Texas violates the doctrine of separation of powers. Attorney General Opinions JM–872 (1988); MW–460 (1982); V–1305, V–1254 (1951); O–4609 (1942).

The State Auditor and the Director of the Legislative Budget Board are officials of the legislative branch of government and they are answerable only to that branch. The Auditor is appointed by the Legislative Audit Committee and serves at the will of the Committee. Gov't Code § 321.005. The Director of the Legislative Budget Board is appointed by the Board and is only accountable to, and serves at the will of, that legislative agency. Gov't Code § 322.004.

The doctrine of separation of powers does not prevent effective coordination and cooperation between the legislative and executive branches of the government in the effective resolution of public problems. State Board of Insurance v. Betts, 308 S.W.2d 846 (Tex.1958). But the legislature may not assume general authority to execute and administer the laws. This principle is uniform throughout American law. See e.g., Morrison v. Olson, supra, I.N.S. v. Chadha, 462 U.S. 919 (1985). Many of the cases from other states supporting the doctrine are collected in Attorney General Opinion JM–872 which concerned the impermissibility of a legislative official—the State Auditor—supervising activities carried out by executive agencies in administering the law. The principle of separation of powers is especially important when the legislature attempts to manage the expenditure of funds already appropriated:

> ***3** [t]he Legislature is no longer authorized to concern itself with the further ... disbursement of the funds, the constitutional inhibition being not only against actual usurpation of the function, but also against one [branch] setting itself up in a supervisory capacity over the actions of another. [Citation omitted.]
>
> * * * *
>
> [T]he fiscal administration of the affairs of the government [is] an executive duty.

Attorney General Opinion V–1254 (1951), at 15. Thus, the Productivity Bonus Commission is unconstitutionally constituted because some of its members are answerable only to the legislature and share responsibility with executive officers for executing the law.

Because the inclusion of officials answerable only to the legislature in command of an executive agency violates the doctrine of separation of powers, you ask whether the Commission may continue to function if the legislative officials occupy "advisory positions" only or abstain from voting.

There is no authority for either proposition. The statute certainly expects that the legislative officials named to the Commission will discharge their duties. These tasks include deciding which agencies are entitled to productivity bonuses and the amount of the bonuses to be awarded. V.T.C.S. art. 6252–29, §§ 8 and 9. Such duties are not merely advisory but rather involve the exercise of fact-finding and the application of discretion in executing a public policy. Officials and officers of the state government, consistent with their duties to the people, may not pick and chose from among the duties they will execute. Additionally, the mere "advisory" presence of officials who serve only at the will of the

legislature in command of an executive agency may lead to an improper encroachment of one branch into the affairs of another. [FN1] See Attorney General Opinion JM–872 (1988).

You also ask:

> Does the Commission have authority to make the awards specified in the statute out of funds already appropriated to the agencies or their divisions, which participate in a productivity bonus plan when some of the appropriated funds are saved in connection with the productivity improvements contemplated by the Act?

Because we find that the composition of the Productivity Bonus Commission is unconstitutional, we do not consider this question.

SUMMARY

> The Productivity Bonus Commission exercises functions of the executive branch of the Government. Because of the doctrine of separation of powers, its composition may not include officials appointed by, and only answerable to, the legislature. Tex. Const. art. II, § 1.

Very truly yours,
Jim Mattox
Attorney General of Texas

Mary Keller
First Assistant Attorney General

Lou McCreary
Executive Assistant Attorney General

Judge Zollie Steakley
Special Assistant Attorney General

Rick Gilpin
Chairman, Opinion Committee

Prepared by

D.R. Bustion, II
*4 Assistant Attorney General

[FN1]. This opinion should not be taken to mean that every entity composed of members or officials of different branches of the government is unconstitutional. Some entities consisting of members from the different branches of government may be authorized by the constitution. Other bodies too numerous to

list here have many duties that are purely advisory or merely ceremonial and do not involve detailed tasks requiring the exercise of discretion about the expenditure of appropriated funds. In such a case, the function of the body may be appropriate under the constitution because nothing in the doctrine of separation of powers prevents coordination and cooperation between the branches of government.

Tex. Atty. Gen. Op. JM-993, 1988 WL 406459 (Tex.A.G.)
END OF DOCUMENT

Westlaw.

Tex. Atty. Gen. Op. JM-872, 1988 WL 406185 (Tex.A.G.)

Tex. Atty. Gen. Op. JM-872, 1988 WL 406185 (Tex.A.G.)

Office of the Attorney General
State of Texas

Opinion No. JM–872

March 14, 1988

Re: Authority of State Auditor and Legislative Audit Committee to conduct economy and efficiency audits and effectiveness audits under section 321.0133 of the Texas Government Code, and related questions (RQ–1279)

Honorable Bob Bullock
Comptroller of Public Accounts
L.B.J. Building
Austin, Texas 78774

Dear Mr. Bullock:

You ask six questions regarding the proper construction and constitutionality of two recently enacted bills that set forth responsibilities and authority of the State Auditor and the Legislative Audit Committee. The Committee comprises the Lieutenant Governor, the Speaker of the House, and the chairmen of the Senate State Affairs Committee, the Senate Finance Committee, the House Appropriations Committee, and the House Ways and Means Committee. See Gov't Code § 321.002. Several of your questions raise issues that have not been addressed yet specifically in any court case or any Attorney General opinion in Texas; these are issues of first impression. The first bill with which you are concerned, House Bill No. 699 [hereinafter H.B. 699] amends the Government Code by adding several sections to chapter 321 governing the State Auditor and the Legislative Audit Committee, including sections 321.0133, 321.0134 and 321.016, that define specifically the sorts of audits that the auditor may conduct with the approval of the committee. Acts 1987, 70th Leg., ch. 862, § 6 at 5876–5889. The second bill with which you are concerned, House Bill No. 2181 [hereinafter H.B. 2181], amends sections 51.005 and 61.065 of the Education Code, and purports to confer joint rulemaking authority on the State Auditor and the College Coordinating Board. Acts 1987, 70th Leg., ch. 823, §§ 3.06, 4.02, at 5712–13, 5725–26. Before we turn to your first question, we first present a brief history of the position of State Auditor in order that we may place in perspective the scope of the 1987 amendments.

The position of 'State Auditor and Efficiency Expert,' an executive branch officer appointed by the

Governor, was created in 1929. [FN1] Acts 1929, 41st Leg., 1st C.S., ch. 91, at 222. He was to be 'an investigator of all custodians of public funds and disbursing officers of the State and personnel of departments.' Acts 1929, 41st Leg., 1st C.S., ch. 91, § 1, at 222. He was granted the authority 'to inspect all the books and records of all the officers, departments and institutions of the State Government' and to 'investigate the efficiency of the the personnel and clerical forces thereof.' Acts 1929, 41st Leg., 1st C.S., ch. 91, § 3, at 223. Section 4 of the act provided the following:

> In addition to the other duties provided for said Auditor, he shall thoroughly examine all departments of the State Government with special regard to their activities and the duplication of efforts between departments, and the efficiency of the subordinate employees in each of such several departments. He shall examine into the work done by the subordinate employees in the several departments of the State Government.
>
> ***2** Upon completing the examination of any department he shall furnish the head of said department with a report on (a) the efficiency of the subordinate employees; (b) the status and condition of all public funds in charge of said department; (c) the amount of duplication between work done by the department so examined and other departments of the State Government; (d) such a system of accounts as will provide for a uniform system of auditing, bookkeeping, and system of accounts for every department of State. He shall also make recommendations to the said head of the departments for the elimination of duplication and inefficiency. A copy of each such report submitted by said officer to the head of the department shall be forthwith furnished to the Governor, the Speaker of the House, and the President of the Senate. Nothing contained herein shall be construed as authorizing the State Auditor to employ or discharge any state employee other than those herein authorized to be appointed by him for his department.

Acts 1929, 41st Leg., 1st C.S., ch. 91, § 4, at 223. And finally, he was required, at section 5, to prepare a report showing the status of all public funds in the state and to 'recommend to the Legislature such changes as he deems necessary to provide uniform, adequate and efficient systems of records and accounting in each department.' Acts 1929, 41st Leg., 1st C.S., ch. 91, § 5, at 224.

The 1929 act was repealed in 1943. The position was renamed 'State Auditor,' and appointment power was vested in the newly-created Legislative Audit Committee, a joint interim committee of the legislature. Acts 1943, 48th Leg., ch. 293, at 429 [codified at V.T.C.S. arts. 4413a–13 through 4413a–24]. Section 7 of 1943 act continued to repose in the Auditor the authority to audit all accounts, books, and financial records of every agency of the state, but the act for the first time purported to confer on the Auditor the authority, not just to report to the legislature recommended changes, but also to direct the administration or execution of the laws by executive branch agencies themselves insofar as he was authorized: 'To require such changes in the accounting system or systems and record or records of any office, department, board, bureau, institution, commission or state agency, that in his opinion will augment or provide a uniform, adequate, and efficient system of records and accounting.' Acts 1943, 48th Leg., ch. 293, § 7(3), at 431. Section 8 of the 1943 act also required the Auditor to prepare, again, a report for the head of every agency on, inter alia, the efficiency of subordinate employees, the amount of duplication between work done by the examined agency and other agencies, and 'any suggested changes looking toward economy and reduction of number of clerical and other employees, and the elimination of duplication and inefficiency.' Section 8 also set forth the following:

> Reports shall also contain specific recommendations to the Legislature for the amendment of existing laws or the passage of new laws designed to improve the functioning of various departments, boards, bureaus, institutions or agencies of State Government to the end that more efficient service may be rendered and the cost of government reduced.

> *3 All recommendations submitted by the State Auditor shall be confined to those matters properly coming within his jurisdiction, which is to see that the laws passed by the Legislature dealing with the expenditure of public moneys are in all respects carefully observed, and that the attention of the Legislature is directed to all cases of violation of the law and to those instances where there is need for change of existing laws or the passage of new laws to secure the efficient spending of public funds. The State Auditor shall not include in his recommendations to the Legislature any recommendations as to the sources from which taxes shall be raised to meet the governmental expense.

Acts 1943, 48th Leg., ch. 293, § 8, at 432. And finally, section 10 of the act authorized the Legislative Audit Committee to conduct hearings with the head of any agency where the Auditor has found 'evidence of improper practices of financial administration or of any general incompetency of personnel, inadequacy of financial records.' Acts 1943, 48th Leg., ch. 293, § 10, at 433. The committee was required to report to the legislature any refusal of the agency officials to remedy 'such incompetency or the installation of proper fiscal records.' Id. Except for a 1977 amendment giving the committee authority to subpoena information that it seeks, the act remained unchanged until 1985. At that time, the articles governing the Legislative Audit Committee and the State Auditor were recodified in a nonsubstantive revision and placed in Chapter 3 of the newly-enacted Government Code. House Bill No. 699 and House Bill No. 2181, the two bills about which you inquire, were adopted in 1987 by the 70th session of the Legislature.

Prior to the enactment of H.B. 699, section 321.013(a) of the Government Code provided, inter alia, that the State Auditor shall 'perform an audit of all governmental accounts, books, and other financial records of any state officer or department.' The chapter did not define 'audit,' but section 321.014(a) provided that the 'State Auditor shall conduct each audit as directed by the committee and as prescribed by this chapter.' With the passage of H.B. 699, section 321.013(f) of the Government Code now confers authority on the State Auditor to conduct various types of audits, specifically 'financial audits, compliance audits, economy and efficiency audits, effectiveness audits, special audits, and investigations as defined by this chapter.'

Sections 321.0133 and 321.0134 of the Government Code define 'economy and efficiency audit' and 'effectiveness audit' respectively. Section 321.0133 of the Government Code provides:

> An economy and efficiency audit is an audit to determine:
>
> (1) whether the audited entity is managing or utilizing its resources, including state funds, personnel, property, equipment, and space, in an economical and efficient manner;
>
> (2) causes of inefficiencies or uneconomical practices, including inadequacies in management information systems, internal and administrative procedures, organizational structure, use of resources, allocation of personnel, purchasing, policies, and equipment; and
>
> *4 (3) whether financial, program, and statistical reports of the audited entity contain useful data and are fairly presented.

Section 321.0134 of the Government Code provides:

> (a) An effectiveness audit is an audit to determine, according to established or designated program objectives, responsibilities or duties, statutes and regulations, program performance criteria, or program evaluation standards:
>
> (1) whether the objectives and intended benefits are being achieved efficiently and effectively; and
>
> (2) whether the program duplicates, overlaps, or conflicts with another state program.
>
> (b) An effectiveness audit may be scheduled only when the audited entity is not scheduled for

review under the Texas Sunset Act (Chapter 325).

Section 321.016 of the Government Code requires, inter alia, that the State Auditor report to the Governor, the Legislative Audit Committee, the administrative head and the chairman of the governing body of the affected agency, any evidence of improper practices of financial administration or 'ineffective program performance'; the Legislative Audit committee is required then to report to the legislature any refusal by the administrative head or the governing body of the agency to make changes recommended by the committee.

You first ask whether section 321.016 of the Government Code, as amended by H.B. 699, is unconstitutional to the extent that it purports to give the Legislative Audit Committee the authority to order changes in the way in which legislation is implemented or administered by an executive agency. Section 321.016, Government Code, now provides the following:

(a) If in the course of an audit the State Auditor finds evidence of improper practices of financial administration, inadequate fiscal records, uneconomical use of resources, or ineffective program performance, the State Auditor, after consulting with the head of the agency, shall immediately report the evidence to the governor, the committee, and the administrative head and the chairman of the governing body of the affected department.

(b) If in the course of an audit the State Auditor finds evidence of an illegal transaction, the State Auditor, after consulting with the head of the agency, shall immediately report the transaction to the governor, the committee, and the appropriate legal authority.

(c) Immediately after the committee receives a report from the State Auditor alleging improper practices of financial administration, uneconomical use of resources, or ineffective program performance, the committee shall review the report and shall consult with and may hold hearings with the administrative head and the chairman of the governing body of the affected department regarding the report.

(d) If the administrative head or the governing body of the affected department refuses to make the changes recommended by the committee at the hearing or provide any additional information or reports requested, the committee shall report the refusal to the legislature.

***5** The various statutes enacted through the years conferring authority upon the Legislative Audit Committee and its effective agent, the State Auditor, reveal a trend toward the conferral of ever-expanding authority on both. The 1929 act conferred upon the State Auditor and Efficiency Expert the authority to examine the fiscal records of every state agency and to make recommendations to the legislature regarding the elimination of duplication and inefficiency. The 1943 act attempted to expand the authority of the newly-named State Auditor by conferring upon him the power, not only to report to the legislature recommended changes, but to direct the administration or execution of the laws by requiring each agency to install whatever method of accounting and record keeping that he recommended. After conducting hearings with the heads of those agencies in which the State Auditor found evidence of improper practices of financial administration, inadequate financial records, or 'general incompetency of personnel,' the newly-created Legislative Audit Committee was required to report to the legislature as a whole any refusal of agency officials to remedy those identified problems. And with the 1987 amendments to the recently-codified Government Code, the State Auditor appears to be empowered to 'audit' not just the efficiency and cost effectiveness of an agency's performance, but also the substantive performance of the tasks and responsibilities imposed by law on an executive agency, i.e. to determine whether there is 'ineffective program performance.' It appears, for example, that inquiry into whether the College Coordinating Board, for instance, is in fact carrying out its statutory responsibilities rests now with the Legislative Audit Committee rather than with the

Committee on Higher Education in the House of Representative and with the Committee on Education in the Senate.

Article II, section 1, of the Texas Constitution provides for the separation of powers between the executive, the judicial, and the legislative branches of government. It states:

> The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one, those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

This office has consistently held that any attempt by the legislature to supervise the implementation of duly enacted statutes through the means of a legislative committee or through some means other than the normal legislative processes (set forth in sections 28 through 40 of article III of the Texas Constitution) Violates article II, section 1. Attorney General Opinions MW–460 (1982), V–1305 (1951); V–1254 (1951); and O–4609 (1942). This rule is the rule in virtually every other state that has had cause to address this issue. See, e.g., Legislative Research Comm'n v. Brown, 664 S.W.2d 907 (Ky. 1984); State ex rel. Stephan v. Kansas House of Representatives, 687 P.2d 622 (Kan. 1984); General Assembly of the State of New Jersey v. Byrne, 448 A.2d 438 (N.J. 1982); State ex rel. Barker v. Manchin, 279 S.E.2d 622 (W. Va. 1981); State of Alaska v. A.L.I.V.E. Voluntary, 606 P.2d 769 (Alaska 1980); see also Bonfield, State Administrative Rule Making, § 8.3.2(c).

***6** In Attorney General Opinion O–4609 (1942), this office addressed whether a bill creating a Joint Legislative Advisory Committee and conferring specific powers thereon was constitutional. The opinion construed a rural aid appropriations bill, Acts 1941, 47th Leg., ch. 549, at 880, that created a joint legislative advisory committee composed of five senate members and five house members. The committee was given the authority to approve numerous transactions, including the receipt of tuition payments and transportation aid by school districts. This office held that only so much of the act that created a joint legislative advisory committee to study school laws as an aid to their recodification was constitutional; the provisions reposing in the committee the authority to administer the law were unconstitutional.

> It is the function of the legislative branch of the government to make the laws; it is the function of the executive branch of the government to administer and execute those laws. In the statute under consideration, the Legislature of the State of Texas has undertaken not only to declare what the law shall be, which is clearly its prerogative, but has also undertaken to clothe a portion of the membership of the Legislature, the Joint Legislative Advisory Committee, with the authority to execute and administer the law passed by the Legislature. Under Article 2, Section 1, of the Constitution of the State of Texas, the Legislature is powerless to clothe itself, or a portion of its members, with executive authority. (Emphasis added.)

Attorney General Opinion O–4609 (1942) at 8.

In Attorney General Opinions V–1305 and V–1254 (1951), this office declared unconstitutional an appropriations act rider that attempted to confer on the Legislative Budget Board the authority to require of various executive branch administrative agencies further itemization of appropriations or

specific approval of the expenditure of appropriated funds by the board.

> The phrase 'any power properly attached to either of the others' [set forth in Article II, section 1] prompts inquiry as to what powers belong to each branch. 'Legislative' means 'making, or having the power to make, a law or laws.' Webster's New International Dictionary (2d Ed. 1938). This includes making and itemizing appropriations. 'The power to itemize appropriations is a legislative power which it may exercise if it sees fit as long as the matter is in its hands. . . . The legislation is complete when the appropriation is made.' People v. Tremaine, 168 N.E. 817 (N.Y. Ct. App. 1929). The money once appropriated, the Legislature is no longer authorized to concern itself with the further segregation and disbursement of the funds, the constitutional inhibition being not only against actual usurpation of the function, but also against one department's setting itself up in a supervisory capacity over the actions of another. [Citation omitted]. Parenthetically, it may be noted here that if the approval of proposed expenditures be considered a legislative function, still such function could not be delegated by the body as a whole to a few of its members. [Citation omitted.]
>
> *7 The legislative function being to make laws, the executive function is to carry them out. Webster's New International Dictionary (2d Ed. 1938), in its definition of 'executive,' uses the phrases 'or carrying into effect' . . . 'or secures their due performance.' More specifically, the fiscal administration of the affairs of the government has been held to be an executive duty. [Citation omitted.] The above riders thus attempt to vest an executive power in a joint committee of the legislative branch. (Emphasis added.)

Attorney General Opinion V–1254 (1951) at 15.

And finally, in Attorney General Opinion MW–460 (1982), this office held unconstitutional legislation that purported to confer authority on the standing committees of both houses of the legislature effectively to veto or repeal administrative rules adopted by executive agencies pursuant to the Administrative Procedure and Texas Register Act, article 6252–13a, V.T.C.S. The opinion held that the discretionary rulemaking authority delegated to an administrative agency is an executive function; it is therefore impermissible under article II, section 1 of the Texas Constitution, for the legislature or one of its committees to usurp the function. See Walker v. Baker, 196 S.W.2d 324 (Tex. 1946); Ex parte Youngblood, 251 S.W. 509 (Tex. Crim. App. 1923).

In passing upon the constitutionality of any statute, we begin with a presumption of validity. Smith v. Davis, 426 S.W.2d 827 (Tex. 1968); Texas National Guard Armory Board v. McCraw, 126 S.W.2d 627 (Tex. 1939). We are required, moreover, to construe the code provisions at issue in a way that comports with the constitution, if any such reasonable construction is possible. McKinney v. Blankenship, 282 S.W.2d 691 (Tex. 1955); Thomas v. Groebl, 212 S.W.2d 625 (Tex. 1948). See also Gov't Code, § 311.021 (Code Construction Act); Local Gov't Code, § 1.002 (application of Code Construction Act to Local Government Code).

If we were to construe section 321.016 of the Government Code in the fashion that you suggest, i.e., as conferring authority on the Legislative Audit Committee to order changes in the way that executive agencies implement or administer duly enacted statutes, we would be constrained to hold the section unconstitutional. However, we do not so construe that provision. Subsection (c) of section 321.016 merely confers on the committee the authority to make recommendations to the various executive agencies, recommendations that each agency may ignore. However, subsection (d) provides that, if any agency refuses to accept any such recommendation, the committee is required to inform the

legislature as a whole of that fact. Subsection (d) permits an ill-disguised attempt by the committee to direct the methods by which investigated administrative agencies execute the laws. While it is true that the committee itself technically is not conferred the authority to impose sanctions or to enforce compliance by those administrative agencies that refuse to comply with committee recommendations, the absence of such conferral of authority does not resolve the article II, section 1, issue. Subsection (d) clearly acts in a punitive, and perhaps in a coercive, fashion that is tantamount to a legislative usurpation of executive power, in violation of article II, section 1, of the Texas Constitution. We do not question the authority of the legislature or of a committee of the legislature to gather information and to investigate those matters about which it properly could enact legislation, a subject that we will address more fully in answer to your fourth and fifth questions. We question only the propriety of making a committee's report to the legislature as a whole mandatory upon an administrative agency's refusal to comply with the committee's recommendations.

***8** As a matter of law, the committee does not have the authority to order any executive agency to implement or administer any law in any particular manner, any more than it has authority to direct officers in the judicial branch in the construction of the laws, which the constitution reposes in the judicial branch. The legislature's authority to direct the administration of laws whose execution is reposed by statute in so-called 'legislative agencies,' see, e.g., Gov't Code, §§ 326.001–326.003, is greater, of course. Accordingly, we conclude that chapter 321 of the Government Code, which creates the Legislative Audit Committee and the office of State Auditor and confers powers and duties thereon, does not authorize the Legislative Audit Committee to order an executive agency to change the way in which it implements or administers any law; however, subsection (d) of section 321.016 does authorize an impermissible intrusion by the legislative branch into areas of administration reposed by the Texas Constitution in the executive branch. Insofar as that subsection requires the committee to report to the legislature as a whole in the event that an administrative agency fails to adopt its recommendations, subsection (d) is unconstitutional.

You next ask whether the State Auditor, whom you characterize as, in effect, an employee of the Legislature, may properly exercise authority to supervise members of the executive branch in their implementation of statutes or whether his proper role is investigatory only. As we noted earlier, the position of State Auditor was created in 1943 to replace an executive officer, the 'State Auditor and Efficiency Expert,' appointed by the governor. Acts 1929, 41st Leg., 1st C.S., ch. 91, at 222. The 1943 act repealed the 1929 act, created the Legislative Audit Committee, renamed the position 'State Auditor,' and conferred authority on the committee to appoint him. There is no question that the State Auditor is an appointee and an agent of the legislature. See Gov't Code, §§ 326.001–326.003 (authorizing co-operation between houses of the legislature and legislative agencies) (formerly codified as article 5429g, V.T.C.S.); see also Attorney General Opinions MW–192 (1980); H–1063 (1977); V–504 (1948). Accordingly, we conclude that the State Auditor is a subordinate of the legislative branch.

For the reasons set forth in answer to your first question, if we were to construe chapter 321 as conferring on the State Auditor the authority to order any changes in the way in which executive agencies administer the laws, we would be constrained to declare any such provisions unconstitutional as a violation of article II, section 1, of the Texas Constitution. And, again, for the reasons set forth in answer to your first question, we do not construe any provision of chapter 321 of the Government Code as conferring authority on the State Auditor to order executive agencies to change the way in

which statutes are implemented or administered. If the State Auditor were part of the executive branch whose activities were directed, as they were prior to the 1943 enactment, by the Governor rather than by the Legislative Audit Committee, his authority possibly could be broader. But such is not the case.

***9** Section 321.013 of the Government Code sets forth the powers and duties of the State Auditor and provides:

(a) The State Auditor shall conduct audits of all departments, including institutions of higher education, as specified in the audit plan. At the direction of the committee, the State Auditor shall conduct an audit or investigation of any entity receiving funds from the state.

(b) The State Auditor shall conduct the audits in accordance with generally accepted auditing standards as prescribed by the American Institute of Certified Public Accountants, the Governmental Accounting Standards Board, the United States General Accounting Office, or other professionally recognized entities that prescribe auditing standards.

(c) The State Auditor shall determine the audit plan for the state for each fiscal year. In devising the plan, the State Auditor shall consider recommendations concerning coordination of agency functions made by the committee composed of the Legislative Budget Board, Sunset Advisory Commission, and State Auditor's Office. The plan shall provide for auditing of federal programs at least once in each fiscal biennium and shall ensure that audit requirements of all bond covenants and other credit or financial agreements are satisfied. The committee shall review and approve the plan.

(d) At any time during an audit or investigation, the State Auditor may require the assistance of the administrative head, official, auditor, accountant, or other employees of the entity being audited or investigated.

(e) The State Auditor is entitled to access to all of the books, accounts, confidential or unconfidential reports, vouchers, or other records of information in any department or entity subject to audit, including access to all electronic data. However, the State Auditor has access to information and data the release of which is restricted under federal law only with the approval of the appropriate federal administrative agency, and the State Auditor shall have access to copyrighted or restricted information obtained by the Office of the Comptroller of Public Accounts under subscription agreements and utilized in the preparation of economic estimates only for audit purposes.

(f) The State Auditor may conduct financial audits, compliance audits, economy and efficiency audits, effectiveness audits, special audits, and investigations as defined by this chapter and specified in the audit plan.

(g) To the extent that the performance of the powers and duties of the State Auditor under law is not impeded or otherwise hindered, the State Auditor shall make reasonable efforts to coordinate requests for employee assistance under Subsection (d) or requests for access to books, accounts, vouchers, records, or data under Subsection (e) so as not to hinder the daily operations of the audited entity.

(h) The State Auditor may not conduct audits of private entities concerning collection or remittance of taxes or fees to the state if the entity is subject to audit by another state agency for the taxes or fees.

***10** (i) If the State Auditor decides a change in an accounting system is necessary, the State Auditor shall consider the present system of books, records, accounts, and reports to ensure that the transition will be gradual and that the past and present records will be coordinated into the new system.

Sections 321.0131 through 321.0136 define the various audits and investigations that the State Auditor

may conduct. Nothing in these sections or in section 321.016, purports to confer any authority upon the State Auditor to direct the activities of state agencies.

In your third question you ask whether sections 51.005 and 61.065 of the Education Code, as amended by H.B. 2181, are unconstitutional insofar as they purport to allow the State Auditor, an agent of the legislative branch, to prescribe administrative rules for state institutions of higher education. Prior to the 1987 amendments, the authority to prescribe such administrative rules was reposed solely in the College Coordinating Board. In a letter accompanying a brief submitted to this office by the State Auditor, it is urged that, if it is constitutional for the legislature to delegate to a member of the executive branch the authority properly to promulgate rules that have the force and effect of law, it is certainly constitutional for the legislature to delegate such authority to a member of the legislative branch. We disagree; we conclude that the amended sections of the Education Code are unconstitutional insofar as they purport to confer joint rulemaking authority on the State Auditor and the College Coordinating Board.

Section 51.005 of the Education Code provides:

> (a) True and full accounts shall be kept by the governing board and by the employees of the institution of all funds collected from all sources and of all sums paid out and the persons to whom and the purposes for which the sums are paid. The governing board shall annually, between September 1 and January 1, print a complete report of all the sums collected, all expenditures, and all sums remaining on hand. The report shall show the true condition of all funds as of the August 31 preceding as well as the collections and expenditures for the preceding year.
>
> (b) Reports under this section must be in a form approved jointly by the coordinating board and the state auditor. The accounting and classification procedures of each institution must be consistent with uniform procedures prescribed for that purpose by the coordinating board and the state auditor. The requirements imposed by the coordinating board and state auditor must be designed to reduce paperwork and duplicative reports.
>
> (c) The governing board shall furnish one copy of the report each to the governor, comptroller of public accounts, state auditor, Texas Higher Education Coordinating Board, Legislative Budget Board, House Appropriations Committee, Senate Finance Committee, and Legislative Reference Library. The governing board shall retain five copies of the report for distribution to legislators or other state officials on request. (Emphasis added.)

***11** Section 61.065 of the Education Code provides:

> (a) The state auditor and the board jointly shall prescribe and periodically update a uniform system of financial accounting and reporting for the institutions of higher education, including definitions of the elements of cost on the basis of which appropriations shall be made and financial records shall be maintained. In order that the uniform system of financial accounting and reporting shall provide for maximum consistency with the national reporting system for higher education, the uniform system shall incorporate insofar as possible the provisions of the financial accounting and reporting manual published by the National Association of College and University Business Officers. The accounts of the institutions shall be maintained and audited in accordance with the approved reporting system.
>
> (b) The coordinating board shall annually evaluate the informational requirements of the state for purposes of simplifying institutional reports of every kind and shall consult with the state auditor in relation to appropriate changes in the uniform system of financial accounting and reporting. (Emphasis added.)

In legal theory, the legislative power vested in the legislature by article III, section 1, of the constitution must be exercised by it alone. Texas National Guard Armory Board v. McCraw, supra; Brown v. Humble Oil & Refining Co., 83 S.W.2d 935 (Tex. 1935). The principle of non-delegation, however, has certain important qualifications. See generally, Annot., Permissible limits to delegation of legislative power, 79 L.Ed. 414 (1935). Many powers properly have been delegated by the legislature to administrative agencies. See, e.g., Housing Authority of Dallas v. Higginbotham, 143 S.W. 79 (Tex. 1940); Brazos River Conservation & Reclamation Dist. v. McCraw, 91 S.W.2d 665 (Tex. 1936); Trimmier v. Carlton, 296 S.W.2d 1070 (Tex. 1927). Among them has been the power to make rules having the force and effect of law. See, e.g., Housing Authority of Dallas v. Higginbotham, supra.; O'Brien v. Amerman, 247 S.W. 270 (Tex. 1922); Spears v. City of San Antonio, 223 S.W. 166 (Tex. 1920). Valid rules promulgated by an administrative agency acting within its statutory authority have the force and effect of legislation. Lewis v. Jacksonville Building and Loan Association, 540 S.W.2d 307 (Tex. 1976). A rule promulgated by an administrative agency acting within its delegated authority should be considered under the same principles as if it were the act of the legislature. Texas Liquor Control Board v. Attic Club, Inc., 457 S.W. 41 (Tex. 1970). Nevertheless, when such rulemaking power is vested in an agency of the state, it is regarded as an incident of the executive power to administer laws enacted by the legislature, and not as a power to enact laws. It is held that an act of the legislature that is complete and comprehensive in itself and which confers upon an agency authority only to establish rules, requlations and minimum standards to reasonably carry out the expressed purposes of the legislature's act, does not make a constitutionally forbidden delegation of legislative power. Oxford v. Hill, 558 S.W.2d 557 (Tex. Civ. App.—Austin 1977, writ ref'd). It confers only the power to efficiently administer the complete law already established by the legislature. See Ex parte Granviel, 561 S.W.2d 503 (Tex. Crim. App. 1978). Cf. Lone Star Gas Company v. State, 153 S.W.2d 681 (Tex. 1941) (delegated power to fix rates is legislative power).

***12** The power to control or correct decisions committed to administrators by law is an executive function. Walker v. Baker, supra. The legislature, of course, may in the first instance severely restrict the discretion of executive officers or administrators to make rules by so thoroughly detailing legislation before it leaves its ambit that little or no room is left for administrative interpretation. See Fire Department of City of Fort Worth v. City of Fort Worth, 217 S.W.2d 664 (Tex. 1949); Letter Advisory No. 2 (1973). And, by the proper exercise of its law-making powers, the legislature may supersede or repeal any agency rule or decision that has acquired the force and effect of law. But when a statute commits to an administrative agency's control the power to execute that law and promulgate rules in order to better administer the legislative policy embodied therein, neither the legislature nor any of its committees may direct that agency regarding the manner in which the executive discretion is thus reposed. Tex. Const. art. II, § 1.

If a discretionary rulemaking function delegated to an administrative agency is an executive function—as we think it is—it is impermissible for the legislature (or one of its committees) to usurp that function. Tex. Const. art. II, § 1, Walker v. Baker, supra; Ex parte Youngblood, supra; Attorney General Opinions V–1254 (1951); O–4609 (1942). See State ex rel. Judge v. Legislative Finance Committee, et al., 543 P.2d 1317 (Mont. 1975). See also Anderson v. Lamm, 579 P.2d 620 (Colo. 1978); In re Opinion of the Justices to the Governor, 341 N.E.2d 254 (Mass. 1976). See also, Railroad Commission of Texas v. Shell Oil Company, 161 S.W.2d 1022 (Tex. 1942); Denison v. State, 61 S.W.2d 1017 (Tex. Civ. App.—Austin), writ ref'd per curiam, 61 S.W.2d 1022 (Tex. 1933).

The amendments also violate article III, section 1, of the Texas Constitution, even if the powers conferred could be said to be purely legislative in character. It was held in Parks v. West, 111 S.W. 726 (Tex. 1908), and reiterated in Walker v. Baker, supra, that where the constitution gives a power and prescribes the means by which or the manner in which it is to be exercised, such means or manner is exclusive of all others. Article III, section 1, of the constitution vests the legislative power of the state 'in a Senate and House of Representatives, which together shall be styled 'The Legislature of the State of Texas." Sections 29 through 40 of that article detail at great length the manner in which the legislature must exercise its right to legislate. Because the means by which the legislature is to accomplish the enactment of laws is expressly provided by the constitution, any authority for the legislature to exercise that right in a different mode is excluded. See Walker v. Baker, supra; American Indemnity Company v. City of Austin, 246 S.W. 1019 (Tex. Crim. App. 1922).

Accordingly, we conclude that the two amended Education Code provisions are unconstitutional because they attempt to confer upon members of the legislative branch of government an executive power to efficiently administer laws enacted by the legislature.

***13** The restrictions in article II, section 1, apply, to a 'collection of persons' of the legislative department. It was held in Ex parte Youngblood, 251 S.W. 509 (Tex. Crim. App. 1923), that when a power conferred by the constitution upon the legislature or either branch thereof is in turn conferred by the constitutionally designated legislative body upon a committee composed of members of the house and senate, the committee is a 'collection of persons' within the proscription of the foregoing constitutional provision—and one to which non-legislative powers cannot be delegated. See also Walker v. Baker, 196 S.W.2d 324 (Tex. 1946); Attorney General Opinions V–1254 (1951); O–4609 (1942). See also Anderson v. Lamm, 579 P.2d 620 (Colo. 1978); In re Opinion of the Justices to the Governor, 341 N.E.2d 254 (Mass. 1976); Bramlette v. Stringer, 195 S.E. 257 (So. Car. 1938); People v. Tremaine, 168 N.E. 817 (N.Y., 1929).

It has been suggested that Texas has adopted the more modern view of the doctrine of separation of powers, which permits cooperation between branches of government rather than enforces a rigid separation between them. It is contended that the older view, perhaps best exemplified by Kilbourn v. Thompson, 103 U.S. 168 (1880), has been discarded in favor of a more flexible construction of the constitutional provision. In Kilbourn v. Thompson, supra, the United States Supreme Court set forth a classic statement of the older construction:

> It is believed to be one of the chief merits of the American system of written constitutional law, that all powers intrusted to government, whether state or national, are divided into the three grand departments of government, the executive, the legislative, and the judicial. That the functions appropriate to each of these branches of government shall be vested in a separate body of public servants, and that the perfection of the system requires that the lines which separate and divide these departments be broadly and clearly defined. It is also essential to the successful working of this system that the persons intrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by the law of its creation be limited to the exercise of the powers appropriate to its own department and to no other. (Emphasis added).

Id. at 190–191. A statement of the more modern view was well expressed in J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928):

> Our Federal Constitution and State Constitutions of this country divide the governmental power into three branches . . .. [T]he rule is . . . in carrying out that constitutional division into three branches it is a breach of the fundamental law if Congress gives up its legislative power and transfers it to the President or to the Judicial branch, or if by law it attempts to invest itself or its members with either executive or judicial power. This is not to say that the three branches are not coordinate parts of one government and that each in the field of its duties may not invoke the action of the other two branches insofar as the action invoked shall not be an assumption of the Constitutional field of action of another branch. In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental coordination. (Emphasis added.)

***14** Id. at 406; see also, Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 at 635 (1952). But see, Singer, 1A Sutherland on Statutory Construction, § 3.07. The rule as stated in Sutherland seems to be:

> This interpretation of the doctrine permits the exercise by one department of some powers of the other departments when it is essential to the discharge of a primary function, when it is not an assumption of the whole power of another department, and when the exercise of the other power does not jeopardize individual liberty.

Id. at § 3.06 (and cases cited therein).

The argument that Texas adopts the more modern view rests primarily upon language found in a case that received no review by the Supreme Court, Coates v. Windham, 613 S.W.2d 572 (Tex. Civ. App.—Austin 1981, no writ), which upheld an appropriations act rider that conferred upon certain, specified public officers the limited and negative power of declining approval of any particular prison site proposed by the Department of Corrections. The relevant passage provides:

> We believe that it is well settled that this constitutional prohibition [providing for separation of powers] states a principle of government and not a rigid classification as in a table of organization. This provision must be interpreted along with other constitutional provisions, and when this is done it is clear that the Constitution does three things: (1) it provides for three polar functions of government; (2) it delegates certain powers to each of the three departments in a distribution of all governmental powers; and (3) it blends legislative, executive, and judicial powers in a great many cases. [Footnote omitted.] The proper interpreation of Article II, section 1 is therefore dictated by its context. The proper interpretation is that this provision prohibits a transfer of a whole mass of powers from one department to another and it prohibits a person of one branch from exercising a power historically or inherently belonging to another department. It may not be interpreted in a way that prevents cooperation or coordination between two or more branches of government, hindering altogether effective governmental action. It was designed, as were other checks and balances, to prevent excesses. (Emphasis in original).

613 S.W.2d 572 at 576.

For purposes of this discussion, we are not prepared to accept the proposition that Texas adopts the more modern, flexible construction of the separation of powers doctrine, absent a definite ruling of the Texas Supreme Court. We note that it is only under that construction that article II, section 1, would permit the legislature, or more specifically a joint interim committee thereof, to appoint the State Auditor, since the appointment power, except for specific constitutional provisions reposing such authority in others, is historically one that inheres in the office of Governor. See, Walker v. Baker, supra. Because you do not ask about the constitutionality of the statute pursuant to which the State

Auditor is appointed, we need not resolve that issue. But even this more flexible construction will not permit the sort of intrusion that the Education Code amendments contemplate.

***15** In State Board of Insurance v. Betts, 308 S.W.2d 846 (Tex. 1958), the court held that, in an instance in which the attorney for a statutory receiver for an insurance company resigned and the board of insurance commissioners did not designate a successor, the district judge had discretionary power to appoint an attorney for the receiver, since he had judicial control or supervision of the receivership case. The statute then in force conferred appointment authority upon the board. The court seemed to accept the modern construction of the separation of powers principle when it rejected a challenge to the judge's action under article II, section 1. But the court stated, at 851–852:

> However the controlling factor in settling the constitutional point presented is the presence or absence of interference with the effective judicial control occasioned by the executive power to select a liquidator. . . . It is only when the functioning of the judicial process in a field constitutionally committed to the control of the courts is interfered with by the executive or legislative branches that a constitutional problem arises. (Emphasis added.)

Analogously, we conclude that the Education Code amendments about which you inquire permit the legislature, or more specifically an effective agent of a committee of the legislature, to interfere with the proper functioning of an executive branch agency in a field constitutionally committed to its control, i.e. the proper execution or administration of the law and the responsibilities duly imposed upon it by statute. Our construction of article II, section 1, and article III, section 1, suggests that the State Auditor may not constitutionally prescribe accounting and record keeping procedures for all state agencies. There is no question that the legislature is authorized to prescribe the accounting and record keeping procedures to be followed by state agencies. It is doubtful, however, whether the State Auditor and the Legislative Audit Committee may prescribe such procedures. Although such authority has been conferred by statute since 1943, general acquiescence in a custom which may not have resulted in a harmful violation of the constitution does not preclude a contest when substantial rights are insisted upon. City of Los Angeles v. Los Angeles City Water Co., 177 U.S. 558 (1919). If it be urged that the result that we reach here is unrealistic, impractical, and inefficient, we note the words of the United States Supreme Court in the recent case of Immigration and Naturalization Service v. Chadha, 462 U.S. 919 at 944 (1983) (which held that the so-called 'legislative veto' is an unconstitutional violation of the implied separation of powers principle of the U.S. Constitution):

> . . . the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government. . . .

***16** We conclude that the Education Code provisions about which you inquire interfere impermissibly with the proper administration of the laws reposed by article II, section 1, in the executive branch. Accordingly, we conclude that it is constitutionally impermissible for the legislature to delegate to the State Auditor and the College Coordinating Board the joint authority to promulgate administrative rules.

You next ask:

> Whether the State Auditor's authority as legislative staff is similarly limited to investigating matters

that could lead to legislation?

Assuming a 'yes' answer to my fourth question, my fifth question is:

> Since the Comptroller and not the Legislature has been given constitutional responsibility for the revenue estimating/budget certification function, Tex. Const. Art. III, Sec. 49a, and it is not clear what legislation could constitutionally be enacted controlling the manner in which the revenue estimate for budget certification is determined, whether the State Auditor has authority to evaluate or inquire into how the revenue estimating/budget certification function is carried out.

Courts in this state long ago upheld the right of the legislature to appoint committees for the purposes of conducting investigations and gathering information regarding the possible enactment of legislation. Ex parte Ferguson, 15 S.W.2d 650 (Tex. 1929); Terrell v. King, 14 S.W.2d 786 (Tex. 1929).

> The legislature has the power to investigate any subject regarding which it may desire information in connection with the proper discharge of its function to enact, amend or repeal statutes or to perform any other act delegated to it by the constitution. . . . A legislature in conducting whatever inquisitions the proper exercise of its functions require, must be as broad as the subject to which the inquiry properly entered into has relation.

Mason, Manual of Legislative Procedure, § 795 (1970). As the Texas Supreme Court declared in Terrell v. Kindg:

> Not only does the Constitution, in the grant of the rule-making power [by means of which each house is empowered to organize itself], authorize either house to name such committees as it may deem necessary or proper for purposes of investigation and inquiry, when looking to the discharge of any legitimate function or duty of such house, but the Constitution goes further and makes consideration by a committee a condition precedent to the enactment of any law. Section 37, article 3.

14 S.W.2d at 789.

Generally, however, the legislative power to investigate is not absolute, see, e.g., Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1962); State ex rel. Fatzer v. Anderson, 299 P.2d 1078 (Kan. 1956); Commonwealth ex rel. Carcaci v. Brandamore, 327 A.2d 1 (Pa. 1974), and it has been held to be limited to the obtaining of information on matters that fall within the proper field of legislative action. See, e.g., Ferrantello v. State, 256 S.W.2d 587 (Tex. Crim. App. 1952); State ex rel. Fatzer v. Anderson, supra; Commonwealth ex rel. Carcaci v. Brandamore, supra. The powers of an investigating committee, subject to limitations on the investigating power of the legislature, are in general as broad as the resolution constituting it. Ex parte Wolters, 144 S.W. 531 (Tex. Crim. App. 1912).

*17 It is a principle of constitutional law that

> where there is a grant of power in the Constitution to a department of Government, or to a constitutional or statutory officer, or tribunal, without defining the manner or form in or by which it is to be exercised and carried into effect, the Legislature may legitimately prescribe reasonable rules by which this may be done. And though such power may not be taken away by the Legislature, and should it fail or refuse to legislate so as to provide for the efficient use and exercise of the power, the department, officer, or tribunal to whom it is delegated might possibly act in accordance with its own discretion, yet when the Legislature has made reasonable and appropriate provisions for its proper exercise, it should and will be exercised in conformity with

such provisions.

Austin v. Gulf, Colorado, and Santa Fe Railroad Co., 45 Tex. 234, 265 (1876). But it is in no way certain that article III, section 49a, fails to set forth the manner or form by which you are required to perform your duty. See, e.g., Attorney General Opinion WW–640 (1959) (holding unconstitutional in part the predecessor statute to article 4348a, V.T.C.S., now codified as Government Code, §§ 403.013, 403.121–403.122). This office declared in Attorney General Opinion JM–666 (1987):

> In Attorney General Opinion WW–640 (1959), Attorney General Will Wilson considered the constitutionality of a bill that, among other things, attempted to control the Comptroller's estimates of the outstanding but undisbursed appropriations to be expected at the end of a biennium. The opinion concluded, 'Insofar as this bill attempts to make estimates it is unconstitutional as a legislative invasion of the duties of the comptroller.'
>
> The bill at issue there, with the offending provision 'making estimates' deleted, became article 4348a, V.T.C.S., still extant. The remainder of the bill, in the form it was considered by Attorney General Wilson, was characterized as an instruction to the Comptroller 'to use the cash accounting basis' and was pronounced constitutional inasmuch as, according to the opinion:
>
> > Reading Section 49a of Article III from its four corners, it is our opinion that this constitutional provision contemplates that the Comptroller, in making his estimate for certification of bills, use the cash accounting method.
>
> Thus, article 4348a, V.T.C.S., is to be read not as a legislative mandate defining the power of the Comptroller under section 49a with respect to certifications or estimates made for the purpose, but, rather, as a direction that he conform to the requirements of section 49a itself by using the cash accounting method in arriving at his estimates for that purpose. (Emphasis added.)

For purposes of this opinion, we accept the assertion that the means and manner by which you must perform the budget certification/revenue estimate certification processes are set forth in the constitution with sufficient specificity such that the legislature is without authority, absent a constitutional amendment, to direct you in the manner in which you carry out your constitutional responsibilities. It necessarily follows that the legislature is without authority to inquire into the manner and method by which you arrive at the budget certification/revenue estimate figures, if the purpose for which it seeks the information is to enact legislation. But, article XVII, section 1, of the Texas Constitution reposes in the legislature the sole authority to propose amendments to the constitution; the issue then focuses upon the authority of the legislature to inquire into the manner and method by which you perform your constitutional duties if such inquiry is done in aid of determining the need for any such amendments.

***18** We are not unmindful of the importance of this question; indeed, it goes to the very heart of the nature of the kind of government that we have. Texas, unlike many states, sets forth in its constitution the duties and responsibilities of many of its state officers. If we permit the State Auditor and the Legislative Audit Committee, under the guise of performing 'economy and efficiency audits' or 'effectiveness audits' to inquire into the manner by which you perform the duties reposed in you by the constitution of this state, we perforce would have to permit such an 'audit' inquiry into the manner in which other constitutional officers perform their constitutional duties. We would have to permit the Legislative Audit Committee and the State Auditor to inquire into the manner by which the Governor exercises his appointment power and his authority to veto legislation. We would have to permit the Legislative Audit Committee and the State Auditor to inquire into the manner in which the justices of the Texas Supreme Court and the Texas Court of Criminal Appeals administer their respective caseloads and deliberate and arrive at their decisions. We would have to permit the Legislative Audit

Committee and the State Auditor to inquire into the manner in which the Attorney General advises and represents state agencies.

We do not resolve here the issue as to the scope that any such legislative inquiry could possess. We think that your question raises the significant issue as to whether the direction or guidance instructing any such investigating committee must be reasonably specific and whether any resolution constituting such investigation must be inveighed with sufficient dignity to convey the extreme significance of what is undertaken. We question whether a mere decision by the State Auditor and the Legislative Audit Committee to so investigate, under the guise of conducting an 'economy and efficiency audit' or an 'effectiveness audit,' is sufficient. We need not, however, determine whether the State Auditor and the Legislative Audit Committee may conduct an 'economy and efficiency audit' or an 'effectiveness audit' for the purpose of making an inquiry into the manner in which you perform the duties reposed in you by the Texas Constitution. We need note only that nothing in the Government Code purports to confer such authority in the first place. Subsection (e) of section 321.013 permits the Auditor to examine, for example, whether subscription material exists, but not the use to which it is put. Nor does it authorize an inquiry into discretionary decision-making by you that is personal to you as a constitutional officer. We add that the Legislative Audit Committee, of course, has no authority to direct you in the manner in which the budget certification/revenue estimate figures are derived.

Finally, you ask whether the State Auditor has the authority to direct an executive agency or officer to seek amendments to the laws or to evaluate the agency or officer on the basis of whether such amendments are sought. The answer to your question is clearly 'no.'

***19** It is well established that a state agency has only those powers expressly granted to it by statute or necessarily implied from the statutory authority conferred or duties imposed. City of Sherman v. Public Utility Commission, 643 S.W.2d 681, 686 (Tex. 1983); Stauffer v. City of San Antonio, 344 S.W.2d 158, 160 (Tex. 1961); Attorney General Opinions JM–452 (1986); JM–256 (1984); MW–532 (1982); V–504 (1948); O–4260 (1942); O–3536 (1941). We need not address whether any statute constitutionally could confer such authority on the State Auditor, because we conclude that no statute purports to do so. We have found no section of the Government Code nor any other statute that purports to confer such authority upon the State Auditor; accordingly, he has none.

SUMMARY

1. No provision in chapter 321 of the Government Code, which sets forth the duties of the State Auditor and the Legislative Audit Committee, purports to confer authority on the committee to direct executive agencies in the manner in which they execute or administer the laws.
2. No provision in chapter 321 of the Government Code purports to confer authority on the State Auditor to direct executive agencies in the manner in which they execute or administer the laws.
3. Sections 51.005 and 61.005 of the Education Code are unconstitutional insofar as they purport to confer authority on the State Auditor to promulgate rules jointly with the College Coordinating Board.
4. Legislative committees properly may gather information and conduct investigations upon any matters about which legislation may be enacted.
5. Because the Texas Constitution reposes in the legislature sole authority to propose constitutional

amendments, legislative committees may gather information and conduct investigations in aid of such authority. However, it is questionable whether a mere decision by the Legislative Audit Committee and the State Auditor to so investigate, under the guise of conducting an 'economy and efficiency audit' or an 'effectiveness audit,' is sufficient to permit such a serious intrusion into the performance of constitutionally imposed duties as is here contemplated by an inquiry into the methods and means whereby you derive the budget certification/revenue estimate figures. This issue need not be decided, because nothing in the Government Code purports to confer the authority to conduct such an inquiry in the first place. The Legislative Audit Committee may not direct the manner in which the Comptroller derives such estimates.

6. The State Auditor possesses no authority either to direct an executive agency or officer to seek amendments to the laws or to evaluate the agency or officer on the basis of whether such amendments are sought.

Very truly yours,
Jim Mattox
Attorney General of Texas

Mary Keller
First Assistant Attorney General

Lou McCreary
Executive Assistant Attorney General

Judge Zollie Steakley
***20** Special Assistant Attorney General

Rick Gilpin
Chairman, Opinion Committee

Prepared by

Jim Moellinger
Assistant Attorney General

[FN1]. We note that section 402.026, Gov't Code, reposes responsibility in the Attorney General, Inter alia, to inspect monthly 'the accounts of the offices of the state treasurer, comptroller, and each other person responsible for collection or custody of state funds.' It appears that this provision, which was first enacted in 1879 and subsequently recodified three times before its inclusion in the non-substantive recodification of the Government Code in 1985, heretofore has not been enforced.

Tex. Atty. Gen. Op. JM-872, 1988 WL 406185 (Tex.A.G.)
END OF DOCUMENT

ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

February 15, 2008

Ms. Zindia Thomas
Assistant Attorney General
Public Information Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2008-02184

Dear Ms. Thomas:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act (the "Act"). Your request was assigned ID# 304812.

The Office of the Attorney General (the "OAG") received a request for documents since May 15, 2007, concerning Request for Opinion No. RQ 0589GA; the names and dates of first hire of personnel who worked on the opinion as well as their resumes and employment applications; and sign-in sheets or registries for December 14, 2007, showing visitors to OAG offices. The OAG states it has released information that is not excepted from public disclosure and confidential information that is subject to release under section 552.008 of the Government Code. However, the OAG argues it need not comply with section 552.008 for information submitted as Exhibit B and asserts Exhibit B and portions of Exhibit C are excepted from disclosure under sections 552.101, 552.102, 552.107, 552.111, 552.117,

552.130, and 552.137 of the Government Code.[1] We have considered the OAG's arguments and have reviewed the submitted sample of information.[2]

The requestor, Representative Jim Dunnam, invokes section 552.008 in his request and states that his request is made for legislative purposes. Section 552.008(b) of the Government Code provides in part as follows:

> [A] governmental body on request by an individual member, agency, or committee of the legislature shall provide public information, including confidential information, to the requesting individual member, agency, or committee of the legislature if the requesting member, agency or committee states that the public information is requested under [the Act] for legislative purposes.

Gov't Code § 552.008(b). Disclosure of information to a legislator does not waive or affect the confidentiality of the information or the right to assert exceptions in the future regarding that information. Section 552.008 prescribes specific procedures relating to the confidential treatment of the shared information. *Id.* The OAG states, pursuant to section 552.008, it has released confidential information to Representative Dunnam in his legislative capacity. However, the OAG objects to the application of section 552.008 to its "opinion drafts and internal communications that arise from the deliberative process of preparing Attorney General Opinions." The OAG contends extension of section 552.008 to such information violates the separation of powers doctrine and intrudes upon the Attorney General's duty under the Texas Constitution to render advisory opinions.

The powers of Texas government are divided into three distinct departments, and one department shall not exercise any powers assigned to either of the others unless expressly permitted to do so. Tex. Const. art. II, § 1. A violation of the separation of powers occurs when one branch of government unduly interferes or threatens to unduly interfere with another branch's effective exercise of its constitutionally assigned powers. *Armadillo Bail Bonds v. State*, 802 S.W.2d 237, 239 (Tex. Crim. App. 1990). The Attorney General is a member of the Executive Department of the State and shall give legal advice in writing to the Governor and other executive officers when requested by them. Tex. Const. art. IV, §§ 1,

[1]The OAG states it will withhold social security numbers of living persons under section 552.147 of the Government Code. Section 552.147(b) authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

[2]We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

22; *see also* Gov't Code § 402.042. The Texas Constitution confers exclusive power to issue advisory opinions on the Attorney General; no constitutional provision confers such power on the legislature. Thus, our inquiry is whether the application of section 552.008 to permit a legislator access to the OAG's internal deliberations would unduly interfere with the Attorney General's effective exercise of his power to render a written advisory opinion.

In support of its assertion, the OAG argues permitting Representative Dunnam access to the information

> would necessarily have a chilling effect on the free flow of ideas, frank communications, and robust deliberations necessary to generating an advisory opinion. It would also inhibit attorneys at the OAG from rendering candid advice and recommendations to the Attorney General on matters relating to advisory opinions. . . . Thus, the substance and quality of the Attorney General's opinion output would necessarily suffer.

We agree and find that applying section 552.008 to the OAG's internal deliberations concerning the issuance of an advisory opinion unduly interferes with the Attorney General's effective exercise of his constitutionally delegated power to give legal advice in writing. Accordingly, the OAG need not provide Exhibit B to Representative Dunnam pursuant to section 552.008. Instead, we will determine whether the OAG may withhold the information under its asserted exceptions.

Section 552.107(1) protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client

privilege applies only to a *confidential* communication, *id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5). Whether a communication meets this definition depends on the *intent* of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

The OAG explains the communications in Exhibit B are confidential communications among OAG attorneys and staff, and they are made in furtherance of the rendition of professional legal services. The OAG states the communications were intended to be confidential and that their confidentiality has been maintained. After reviewing the OAG's arguments and the submitted information, we agree the communications in Exhibit B constitute privileged attorney-client communications that the OAG may withhold under section 552.107. Because section 552.107 is dispositive, we do not address the OAG's other arguments for Exhibit B.

Section 552.117(a)(1) excepts from disclosure the home address, home telephone number, social security number, and family member information of a current or former employee of a governmental body who requests that this information be kept confidential under section 552.024. We note that an individual's personal post office box number is not a "home address" and therefore may not be withheld under section 552.117.[3] Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The OAG explains all but one OAG employee timely elected to keep their information confidential. Therefore, the OAG must withhold the personal information of those employees who timely elected confidentiality, including personal cellular phone numbers and home fax numbers, under section 552.117(a)(1) because the OAG states it does not pay for the employee's cellular phone service. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular phone numbers paid for by governmental body and intended for official use). We have marked the types of information the OAG must withhold under section 552.117(a)(1).

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[3]*See* Gov't Code § 552.117; Open Records Decision No. 622 at 4 (1994) (legislative history makes clear that purpose of Gov't Code § 552.117 is to protect public employees from being harassed *at home*) (citing House Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985); Senate Committee on State Affairs, Bill Analysis, H.B. 1976, 69th Leg. (1985)) (emphasis added).

Section 552.130 of the Government Code excepts from public disclosure information relating to a Texas driver's license; it does not apply to out-of-state motor vehicle record information. Thus, the OAG must withhold the Texas motor vehicle record information under section 552.130.

Section 552.137 of the Government Code requires a governmental body to withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. Gov't Code § 552.137(a), (b). Thus, because the OAG informs us the individuals at issue have not affirmatively consented to the release of their e-mail addresses, the OAG must withhold the private e-mail addresses pursuant to section 552.137.

Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Accordingly, we will consider your section 552.101 and section 552.102 claims together.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. For information to be protected from public disclosure by the common law right of privacy under section 552.101, the information must meet the criteria set out in *Industrial Foundation*. In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685. After reviewing Exhibit C, we conclude it does not contain any private information because the information is either not highly intimate or embarrassing or there is a legitimate public interest in the information. Thus, the OAG may not withhold any of Exhibit C under common-law privacy.

Lastly, although the OAG takes no position as to the confidentiality of dates of birth, it believes it cannot release them until the conclusion of litigation on this matter. The litigation has concluded and the Austin Court of Appeals held that dates of birth are not private and are not excepted from disclosure under the Act. *Tex. Comptroller of Public Accounts v. Attorney Gen. of Tex.*, No. 03-07-00102-CV, 2008 WL 160173 (Tex. App.—Austin Jan. 17, 2008, no pet. h.). Thus, the OAG may not withhold the dates of birth.

In summary, the OAG need not provide Exhibit B to Representative Dunnam pursuant to section 552.008. Instead, the OAG may withhold Exhibit B pursuant to section 552.107. The OAG must withhold the following information in Exhibit C: 1) the information we marked under section 552.117(a)(1) of employees who timely elected confidentiality; 2) the Texas motor vehicle record information under section 552.130; and 3) the private e-mail addresses under section 552.137. The rest of Exhibit C is not confidential.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

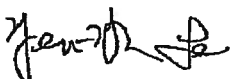
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/sdk

Ref: ID# 304812

Enc: Marked documents

c: The Honorable Jim Dunnam
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768-2910
(w/o enclosures)

TEXAS CONSTITUTIONAL PROVISIONS CITED IN THE ABOVE BRIEF

ARTICLE 2. THE POWERS OF GOVERNMENT

Sec. 1. DIVISION OF POWERS; THREE SEPARATE DEPARTMENTS; EXERCISE OF POWER PROPERLY ATTACHED TO OTHER DEPARTMENTS. The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

ARTICLE 4. EXECUTIVE DEPARTMENT

Sec. 1. OFFICERS CONSTITUTING THE EXECUTIVE DEPARTMENT. The Executive Department of the State shall consist of a Governor, who shall be the Chief Executive Officer of the State, a Lieutenant Governor, Secretary of State, Comptroller of Public Accounts, Commissioner of the General Land Office, and Attorney General.

Sec. 10. EXECUTION OF LAWS; CONDUCT OF BUSINESS WITH OTHER STATES AND UNITED STATES. He shall cause the laws to be faithfully executed and shall conduct, in person, or in such manner as shall be prescribed by law, all intercourse and business of the State with other States and with the United States.

Sec. 22. ATTORNEY GENERAL. The 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 especially inquire into the charter rights of all private corporations, and from time to time, in the name of the State, take such action in the courts as may be proper and necessary to prevent any private corporation from exercising any power or demanding or collecting any species of taxes, tolls, freight or wharfage not authorized by law. He shall, whenever sufficient cause exists, seek a judicial forfeiture of such charters, unless otherwise expressly directed by law, and 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.

ARTICLE 5. JUDICIAL DEPARTMENT

Sec. 23. SHERIFFS. There shall be elected by the qualified voters of each county a Sheriff, who shall hold his office for the term of four years, whose duties, qualifications, perquisites, and fees of office, shall be prescribed by the Legislature, and vacancies in whose office shall be filled by the Commissioners Court until the next general election.

ARTICLE 16. GENERAL PROVISIONS

Sec. 59. CONSERVATION AND DEVELOPMENT OF NATURAL RESOURCES AND PARKS AND RECREATIONAL FACILITIES; CONSERVATION AND RECLAMATION DISTRICTS. (a) The conservation and development of all of the natural resources of this State, and development of parks and recreational facilities, including the control, storing, preservation and distribution of its storm and flood waters, the waters of its rivers and streams, for irrigation, power and all other useful purposes, the reclamation and irrigation of its arid, semiarid and other lands needing irrigation, the

reclamation and drainage of its overflowed lands, and other lands needing drainage, the conservation and development of its forests, water and hydro-electric power, the navigation of its inland and coastal waters, and the preservation and conservation of all such natural resources of the State are each and all hereby declared public rights and duties; and the Legislature shall pass all such laws as may be appropriate thereto.

(b) There may be created within the State of Texas, or the State may be divided into, such number of conservation and reclamation districts as may be determined to be essential to the accomplishment of the purposes of this amendment to the constitution, which districts shall be governmental agencies and bodies politic and corporate with such powers of government and with the authority to exercise such rights, privileges and functions concerning the subject matter of this amendment as may be conferred by law.

(c) The Legislature shall authorize all such indebtedness as may be necessary to provide all improvements and the maintenance thereof requisite to the achievement of the purposes of this amendment. All such indebtedness may be evidenced by bonds of such conservation and reclamation districts, to be issued under such regulations as may be prescribed by law. The Legislature shall also authorize the levy and collection within such districts of all such taxes, equitably distributed, as may be necessary for the payment of the interest and the creation of a sinking fund for the payment of such bonds and for the maintenance of such districts and improvements. Such indebtedness shall be a lien upon the property assessed for the payment thereof. The Legislature shall not authorize the issuance of any bonds or provide for any indebtedness against any reclamation district unless such proposition shall first be submitted to the qualified voters of such district and the proposition adopted.

(c-1) In addition and only as provided by this subsection, the Legislature may authorize conservation and reclamation districts to develop and finance with taxes those types and categories of parks and recreational facilities that were not authorized by this section to be developed and financed with taxes before September 13, 2003. For development of such parks and recreational facilities, the Legislature may authorize indebtedness payable from taxes as may be necessary to provide for improvements and maintenance only for a conservation and reclamation district all or part of which is located in Bexar County, Bastrop County, Waller County, Travis County, Williamson County, Harris County, Galveston County, Brazoria County, Fort Bend County, or Montgomery County, or for the Tarrant Regional Water District, a water control and improvement district located in whole or in part in Tarrant County. All the indebtedness may be evidenced by bonds of the conservation and reclamation district, to be issued under regulations as may be prescribed by law. The Legislature may also authorize the levy and collection within such district of all taxes, equitably distributed, as may be necessary for the payment of the interest and the creation of a sinking fund for the payment of the bonds and for maintenance of and improvements to such parks and recreational facilities. The indebtedness shall be a lien on the property assessed for the payment of the bonds. The Legislature may not authorize the issuance of bonds or provide for indebtedness under this subsection against a conservation and reclamation district unless a proposition is first submitted to the qualified voters of the district and the proposition is adopted. This subsection expands the authority of the Legislature with respect to certain conservation and reclamation districts and is not a limitation on the authority of the Legislature with respect to conservation and reclamation districts and parks and recreational facilities pursuant to this section as that authority existed before September 13, 2003.

(d) No law creating a conservation and reclamation district shall be passed unless notice of the intention to introduce such a bill setting forth the general substance of the contemplated law shall

have been published at least thirty (30) days and not more than ninety (90) days prior to the introduction thereof in a newspaper or newspapers having general circulation in the county or counties in which said district or any part thereof is or will be located and by delivering a copy of such notice and such bill to the Governor who shall submit such notice and bill to the Texas Water Commission, or its successor, which shall file its recommendation as to such bill with the Governor, Lieutenant Governor and Speaker of the House of Representatives within thirty (30) days from date notice was received by the Texas Water Commission. Such notice and copy of bill shall also be given of the introduction of any bill amending a law creating or governing a particular conservation and reclamation district if such bill (1) adds additional land to the district, (2) alters the taxing authority of the district, (3) alters the authority of the district with respect to the issuance of bonds, or (4) alters the qualifications or terms of office of the members of the governing body of the district.

(e) No law creating a conservation and reclamation district shall be passed unless, at the time notice of the intention to introduce a bill is published as provided in Subsection (d) of this section, a copy of the proposed bill is delivered to the commissioners court of each county in which said district or any part thereof is or will be located and to the governing body of each incorporated city or town in whose jurisdiction said district or any part thereof is or will be located. Each such commissioners court and governing body may file its written consent or opposition to the creation of the proposed district with the governor, lieutenant governor, and speaker of the house of representatives. Each special law creating a conservation and reclamation district shall comply with the provisions of the general laws then in effect relating to consent by political subdivisions to the creation of conservation and reclamation districts and to the inclusion of land within the district.

(f) A conservation and reclamation district created under this section to perform any or all of the purposes of this section may engage in fire-fighting activities and may issue bonds or other indebtedness for fire-fighting purposes as provided by law and this constitution.

TEXAS GOVERNMENT CODE PROVISIONS CITED IN THE ABOVE BRIEF

Sec. 324.002. ESTABLISHMENT. The Legislative Reference Library is an independent agency of the legislature.

Acts 1985, 69th Leg., ch. 479, Sec. 1, eff. Sept. 1, 1985.

Sec. 402.042. QUESTIONS OF PUBLIC INTEREST AND OFFICIAL DUTIES. (a) On request of a person listed in Subsection (b), the attorney general shall issue a written opinion on a question affecting the public interest or concerning the official duties of the requesting person.

(b) An opinion may be requested by:

(1) the governor;

(2) the head of a department of state government;

(3) a head or board of a penal institution;

(4) a head or board of an eleemosynary institution;

(5) the head of a state board;

(6) a regent or trustee of a state educational institution;

(7) a committee of a house of the legislature;

(8) a county auditor authorized by law; or

(9) the chairman of the governing board of a river authority.

(c) A request for an opinion must be in writing and sent by certified or registered mail, with return receipt requested, addressed to the office of the attorney general in Austin. The attorney general shall:

(1) acknowledge receipt of the request not later than the 15th day after the date that it is received; and

(2) issue the opinion not later than the 180th day after the date that it is received, unless before that deadline the attorney general notifies the requesting person in writing that the opinion will be delayed or not rendered and states the reasons for the delay or refusal.

(d) The attorney general and the requesting person by written agreement may waive the provisions of Subsections (a) and (c) if the waiver does not substantially prejudice any person's

legal rights.

Acts 1987, 70th Leg., ch. 147, Sec. 1, eff. Sept. 1, 1987.

Sec. 552.008. INFORMATION FOR LEGISLATIVE PURPOSES. (a) This chapter does not grant authority to withhold information from individual members, agencies, or committees of the legislature to use for legislative purposes.

(b) A governmental body on request by an individual member, agency, or committee of the legislature shall provide public information, including confidential information, to the requesting member, agency, or committee for inspection or duplication in accordance with this chapter if the requesting member, agency, or committee states that the public information is requested under this chapter for legislative purposes. A governmental body, by providing public information under this section that is confidential or otherwise excepted from required disclosure under law, does not waive or affect the confidentiality of the information for purposes of state or federal law or waive the right to assert exceptions to required disclosure of the information in the future. The governmental body may require the requesting individual member of the legislature, the requesting legislative agency or committee, or the members or employees of the requesting entity who will view or handle information that is received under this section and that is confidential under law to sign a confidentiality agreement that covers the information and requires that:

(1) the information not be disclosed outside the requesting entity, or within the requesting entity for purposes other than the purpose for which it was received;

(2) the information be labeled as confidential;

(3) the information be kept securely; or

(4) the number of copies made of the information or the notes taken from the information that implicate the confidential nature of the information be controlled, with all copies or notes that are not destroyed or returned to the governmental body remaining confidential and subject to the confidentiality agreement.

(c) This section does not affect:

(1) the right of an individual member, agency, or committee of the legislature to obtain information from a governmental body under other law, including under the rules of either house of the legislature;

(2) the procedures under which the information is obtained under other law; or

(3) the use that may be made of the information obtained under other law.

Added by Acts 1993, 73rd Leg., ch. 268, Sec. 1, eff. Sept. 1, 1993. Amended by Acts 1995, 74th Leg., ch. 1035, Sec. 2, eff. Sept. 1, 1995.

TEXAS HEALTH AND SAFETY CODE PROVISIONS CITED IN THE ABOVE BRIEF

Sec. 382.002. POLICY AND PURPOSE. (a) The policy of this state and the purpose of this chapter are to safeguard the state's air resources from pollution by controlling or abating air pollution and emissions of air contaminants, consistent with the protection of public health, general welfare, and physical property, including the esthetic enjoyment of air resources by the public and the maintenance of adequate visibility.

(b) It is intended that this chapter be vigorously enforced and that violations of this chapter or any rule or order of the Texas Natural Resource Conservation Commission result in expeditious initiation of enforcement actions as provided by this chapter.

Acts 1989, 71st Leg., ch. 678, Sec. 1, eff. Sept. 1, 1989. Amended by Acts 1995, 74th Leg., ch. 76, Sec. 11.139, eff. Sept. 1, 1995.

Sec. 382.0518. PRECONSTRUCTION PERMIT. (a) Before work is begun on the construction of a new facility or a modification of an existing facility that may emit air contaminants, the person planning the construction or modification must obtain a permit or permit amendment from the commission.

(b) The commission shall grant within a reasonable time a permit or permit amendment to construct or modify a facility if, from the information available to the commission, including information presented at any hearing held under Section 382.056(k), the commission finds:

(1) the proposed facility for which a permit, permit amendment, or a special permit is sought will use at least the best available control technology, considering the technical practicability and economic reasonableness of reducing or eliminating the emissions resulting from the facility; and

(2) no indication that the emissions from the facility will contravene the intent of this chapter, including protection of the public's health and physical property.

(c) In considering the issuance, amendment, or renewal of a permit, the commission may consider the applicant's compliance history in accordance with the method for evaluating compliance history developed by the commission under Section 5.754, Water Code. In considering an applicant's compliance history under this subsection, the commission shall consider as evidence of compliance information regarding the applicant's implementation of an environmental management system at the facility for which the permit, permit amendment, or permit renewal is sought. In this subsection, "environmental management system" has the meaning assigned by Section 5.127, Water Code.

(d) If the commission finds that the emissions from the proposed facility will contravene the standards under Subsection (b) or will contravene the intent of this chapter, the commission may not grant the permit, permit amendment, or special permit and shall set out in a report to the applicant its specific objections to the submitted plans of the proposed facility.

(e) If the person applying for a permit, permit amendment, or special permit makes the

alterations in the person's plans and specifications to meet the commission's specific objections, the commission shall grant the permit, permit amendment, or special permit. If the person fails or refuses to alter the plans and specifications, the commission may not grant the permit, permit amendment, or special permit. The commission may refuse to accept a person's new application until the commission's objections to the plans previously submitted by that person are satisfied.

(f) A person may operate a facility or source under a permit issued by the commission under this section if:

(1) the facility or source is not required to obtain a federal operating permit under Section 382.054; and

(2) within the time and in the manner prescribed by commission rule, the permit holder demonstrates that:

(A) the facility complies with all terms of the existing preconstruction permit; and

(B) operation of the facility or source will not violate the intent of this chapter or standards adopted by the commission.

(g) Subsections (a)-(d) do not apply to a person who has executed a contract or has begun construction for an addition, alteration, or modification to a new or an existing facility on or before August 30, 1971, and who has complied with the requirements of Section 382.060, as it existed on November 30, 1991. To qualify for any exemption under this subsection, a contract may not have a beginning construction date later than February 29, 1972.

(h) Section 382.056 does not apply to an applicant for a permit amendment under this section if the total emissions increase from all facilities authorized under the amended permit will meet the de minimis criteria defined by commission rule and will not change in character. For a facility affected by Section 382.020, Section 382.056 does not apply to an applicant for a permit amendment under this section if the total emissions increase from all facilities authorized under the permit amendment is not significant and will not change in character. In this subsection, a finding that a total emissions increase is not significant must be made as provided under Section 382.05196 for a finding under that section.

(i) In considering a permit amendment under this section the commission shall consider any adjudicated decision or compliance proceeding within the five years before the date on which the application was filed that addressed the applicant's past performance and compliance with the laws of this state, another state, or the United States governing air contaminants or with the terms of any permit or order issued by the commission.

Added by Acts 1991, 72nd Leg., 1st C.S., ch. 3, Sec. 2.08, eff. Sept. 1, 1991. Amended by Acts 1995, 74th Leg., ch. 76, Sec. 11.162, eff. Sept. 1, 1995; Acts 1995, 74th Leg., ch. 150, Sec. 3, eff. May 19, 1995; Acts 2001, 77th Leg., ch. 965, Sec. 16.13, eff. Sept. 1, 2001; Acts 2001, 77th Leg., ch. 1161, Sec. 6, eff. Sept. 1, 2001; Acts 2001, 77th Leg., ch. 1327, Sec. 2, eff. Sept. 1, 2001.

TEXAS WATER CODE PROVISIONS CITED IN THE ABOVE BRIEF

Sec. 5.012. DECLARATION OF POLICY. The commission is the agency of the state given primary responsibility for implementing the constitution and laws of this state relating to the conservation of natural resources and the protection of the environment.

Amended by Acts 1985, 69th Leg., ch. 795, Sec. 1.001, eff. Sept. 1, 1985; Acts 1991, 72nd Leg., 1st C.S., ch. 3, Sec. 1.004, eff. Aug. 12, 1991.

Sec. 5.052. MEMBERS OF THE COMMISSION; APPOINTMENT. (a) The commission is composed of three members who are appointed by the governor with the advice and consent of the senate to represent the general public.

(b) The governor shall make the appointments in such a manner that each member is from a different section of the state.

(c) Appointments to the commission shall be made without regard to the race, color, disability, sex, religion, age, or national origin of the appointees.

Amended by Acts 1985, 69th Leg., ch. 795, Sec. 1.001, eff. Sept. 1, 1985; Acts 1993, 73rd Leg., ch. 485, Sec. 1, eff. June 9, 1993; Acts 2001, 77th Leg., ch. 965, Sec. 1.03, eff. Sept. 1, 2001.

Sec. 5.056. TERMS OF OFFICE. (a) The members of the commission hold office for staggered terms of six years, with the term of one member expiring every two years. Each member holds office until his successor is appointed and has qualified.

(b) A person appointed to the commission may not serve for more than two six-year terms.

Amended by Acts 1985, 69th Leg., ch. 795, Sec. 1.001, eff. Sept. 1, 1985.

Sec. 5.057. FULL-TIME SERVICE. Each member of the commission shall serve on a full-time basis.

Amended by Acts 1985, 69th Leg., ch. 795, Sec. 1.001, eff. Sept. 1, 1985.

Sec. 5.108. EXECUTIVE DIRECTOR. (a) The commission shall appoint an executive director to serve at the will of the commission.

(b) The board shall exercise the powers of appointment which the Texas Water Rights Commission had the authority to exercise on August 30, 1977, except for those powers of appointment expressly provided to the Texas Water Rights Commission in Chapters 50 through 63 inclusive, of the Water Code, which are delegated to the commission.

Amended by Acts 1985, 69th Leg., ch. 795, Sec. 1.001, eff. Sept. 1, 1985.