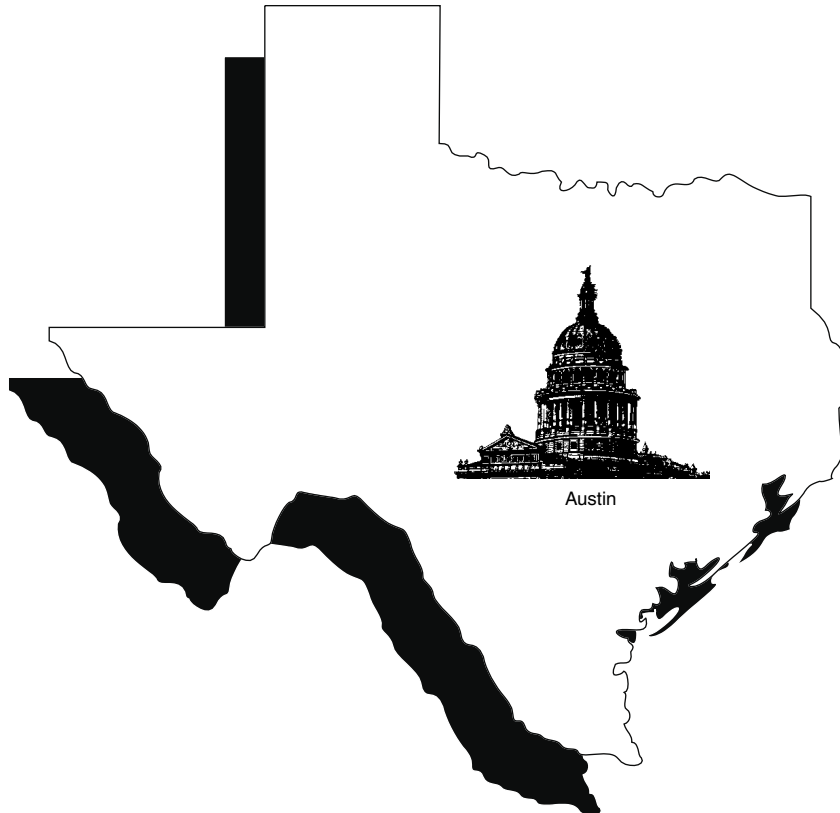


# **Sunset Advisory Commission**



## **Funeral Service Commission**



**Staff Report**

**2000**

## SUNSET ADVISORY COMMISSION

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In 1977, the Texas Legislature created the Sunset Advisory Commission to identify and eliminate waste, duplication, and inefficiency in government agencies. The 10-member Commission is a legislative body that reviews the policies and programs of more than 150 government agencies every 12 years. The Commission questions the need for each agency, looks for potential duplication of other public services or programs, and considers new and innovative changes to improve each agency's operations and activities. The Commission seeks public input through hearings on every agency under Sunset review and recommends actions on each agency to the full Legislature. In most cases, agencies under Sunset review are automatically abolished unless legislation is enacted to continue them. This report is the Commission staff's recommendations, which serves as the starting point for the Commission's deliberations.

**TEXAS FUNERAL SERVICE COMMISSION**

**SUNSET STAFF REPORT**

# Table of Contents

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	<b>PAGE</b>
<b>SUMMARY</b>	
.....	1
<b>ISSUES / RECOMMENDATIONS</b>	
1 The Commission Continues to Struggle and Needs Help to Succeed as an Effective State Agency .....	7
2 The Commission Does Not Provide Adequate Information to Consumers or Funeral Professionals .....	19
3 The Commission Lacks Certain Key Components to Effectively License, Inspect, and Investigate Complaints Against Funeral Directors and Embalmers .....	25
4 The Commission's Complaint Process Wastes Limited Agency Resources and Lacks an Effective Appeal Structure .....	31
5 The Commission Does Not Have Appropriate Guidelines in Place for Imposing Fines and Sanctions .....	39
6 Not Regulating the Burial and Final Disposition of a Body Fails to Adequately Protect Consumers From False or Deceptive Practices .....	47
7 The Composition of the Texas Funeral Service Commission Violates Recent Changes to the Constitution .....	57
<b>Department of Banking: Oversight of Prepaid Funeral Contracts and Perpetual Care Cemeteries .....</b>	<b>61</b>
8 State Law Lacks Reasonable Consumer Protection for Prepaid Funeral Contracts .....	63
9 The Department of Banking Lacks the Enforcement Authority to Effectively Enforce Statutes Regarding Prepaid Funeral Contracts and Perpetual Care Cemeteries .....	71

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## **ACROSS-THE-BOARD RECOMMENDATIONS**

Funeral Service Commission .....	77
Department of Banking Prepaid Funeral Contracts and Perpetual Care Cemeteries .....	79

## **AGENCY INFORMATION**

.....	81
-------	----

## **APPENDICES**

Appendix A – Results of Sunset Survey of Funeral Industry Professionals and Complainants .....	93
Appendix B – Historically Underutilized Businesses Statistics .....	103
Appendix C – Sunset Staff Review Activities .....	105

# **SUMMARY**

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# Summary

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## Overview

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Over the last year, the Funeral Service Commission has taken steps to improve, including clearing out a large backlog of complaints, establishing a Web site, and reducing staff turnover. However, the Commission continues to face significant problems, and needs help to effectively regulate the funeral service industry and protect consumers.

The recommendations in this report would require the Commission to:

- provide easier-to-understand, more accessible information about funeral planning and regulation;
- implement a risk-based approach to scheduling inspections and investigating complaints;
- develop and adopt an open and fair complaint process; and
- establish clear guidelines for the effective use of fines and sanctions.

Due to ongoing concerns, the Commission should be continued for a two-year probationary period. Sunset staff would perform a limited review in 2002 to evaluate whether the Commission has shown significant progress in addressing the problems raised in this report. Sunset staff recommends creating a task force of state agency, industry, and consumer representatives to provide the Commission with additional expertise to successfully implement these changes. The Commission would also contract with the Department of Information Resources and the Office of the Attorney General for technological and legal support.

### Department of Banking: Oversight of Prepaid Funeral Contracts and Perpetual Care Cemeteries

This report also includes two recommendations affecting the Department of Banking. Evaluation of these activities was delayed during the review of the Department of Banking pending the results of this report. These recommendations would provide for greater consumer protection in prepaid funeral contracts, and increase the Department's enforcement authority over the sale of prepaid funeral contracts and perpetual care cemeteries.

A summary of the key recommendations and findings of each of the issues identified in this report follows.

## **Issues / Recommendations**

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### **Issue 1 The Commission Continues to Struggle and Needs Help to Succeed as an Effective State Agency.**

#### Key Recommendations

- Continue the Commission for a two-year probationary period and require the Sunset Commission to re-evaluate the agency to ensure that needed changes have been implemented before the legislative session in 2003.
  - Create a task force to guide the Commission in the implementation of these recommended changes.
  - For additional technical support, add the Commission as a member of the Health Professions Council.
- 

### **Issue 2 The Commission Does Not Provide Adequate Information to Consumers or Funeral Professionals.**

#### Key Recommendations

- The Commission should add consumer information to its Web site, including information on funeral prices and sanctions taken by the agency.
  - The Commission should provide information to industry members to keep them informed of changes and activities of the Commission.
- 

### **Issue 3 The Commission Lacks Certain Key Components to Effectively License, Inspect, and Investigate Complaints Against Funeral Directors and Embalmers.**

#### Key Recommendations

- Remove the requirement for annual inspections of all funeral establishments, and require the Commission to base inspections on a risk assessment tool.
- Expand the Commission's authority to stagger the renewal of individual licenses to include establishment licenses.
- The Commission should implement a complaint resolution system that ranks complaints according to the order of initial receipt and severity of the alleged violation.



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**Issue 4 The Commission's Complaint Process Wastes Limited Agency Resources and Lacks an Effective Appeal Structure.**

## Key Recommendations

- Require the Commission to adopt rules that comprehensively outline a complaint process.
- Remove the provision authorizing Commission member participation in informal hearings.

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**Issue 5 The Commission Does Not Have Appropriate Guidelines in Place for Imposing Fines and Sanctions.**

## Key Recommendations

- Amend the Commission's administrative penalty provisions to require the consideration of standard factors, such as the seriousness of the violation and the threat to the public's health or safety, in setting the amount of a fine.
- Require the Commission to adopt, by rule, guidelines for more consistently linking violations with the appropriate sanction or fine.
- The agency should annually report to the Commission a summary of all violations confirmed, and the sanctions imposed to address these violations.

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**Issue 6 Not Regulating the Burial and Final Disposition of a Body Fails to Adequately Protect Consumers from False or Deceptive Practices.**

## Key Recommendations

- Require the registration of owners or operators of cemeteries and crematories with the Funeral Service Commission to ensure responsibility for the complete disposition of a body.
- Require cemeteries and crematories to disclose information to consumers.
- Authorize the Commission to enforce violations of unprofessional conduct by owners or operators of cemeteries and crematories, as defined by Commission rules.
- Authorize the Commission to set, in rule, reasonable fees to cover the costs of registration of cemeteries and crematories.
- Ensure that funeral directors are responsible for services and goods they subcontract or arrange for as part of a package funeral, including cemetery and crematory services.

**Issue 7 The Composition of the Funeral Service Commission Violates Recent Changes to the Constitution.**

Key Recommendation

- Expand the Funeral Service Commission from six to seven members by adding a funeral industry representative.
- 

**Issue 8 State Law Lacks Reasonable Consumer Protection for Prepaid Funeral Contracts.**

Key Recommendations

- Prohibit the use of finance charges on all prepaid funeral contracts.
  - Allow consumers to receive the full fair value of their investment upon cancellation of a prepaid funeral contract.
  - Require that consumers and/or their estate receive the full fair value of their investment at time of death.
  - Require that prepaid funeral contracts be written in plain language with full disclosure of services that are and are not provided.
- 

**Issue 9 The Department of Banking Lacks the Authority to Effectively Enforce Statutes Regarding Prepaid Funeral Contracts and Perpetual Care Cemeteries.**

Key Recommendations

- Authorize the Department of Banking to use administrative penalties against perpetual care cemeteries found in violation of the Code, and expand the Department's ability to increase penalties for repeat violations by prepaid funeral contract sellers.
- Grant the Finance Commission rulemaking authority over perpetual care cemeteries regulated by the Department of Banking.
- Allow the Department of Banking to review all necessary records relating to perpetual care cemeteries.

## Fiscal Implication Summary

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This report contains recommendations that would have a fiscal impact to the State, however these costs should be covered by licensing fee revenue. They are discussed below, followed by a chart that summarizes the fiscal impact.

- Issue 1 - Continuing the Commission for a probationary period with outside computer and legal assistance would require several one-time expenditures followed by lesser, annual maintenance costs. All costs should be absorbed by increased licensing fees.
- Issue 2 - Providing more easily accessible information would require additional Web site contracting, but this cost was not estimated for this report.
- Issue 6 - Expanding the Commission's authority over certain cemetery and crematory services would require additional expenditures, but new permitting fees would cover additional costs.
- Issue 7 - Expanding the Commission's size to seven members would require additional travel expenses and per diem for the new member.

<b>Fiscal Year</b>	<b>Cost to the General Revenue</b>	<b>Gain to General Revenue</b>	<b>Change in FTEs from FY 2001</b>
2002	\$350,860	\$350,860	+2
2003	\$75,648	\$75,648	+2
2004	\$75,648	\$75,648	+2
2005	\$75,648	\$75,648	+2
2006	\$75,648	\$75,648	+2



**ISSUES / RECOMMENDATIONS**

# Issue 1

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## The Commission Continues to Struggle and Needs Help to Succeed as an Effective State Agency.

### Summary

#### Key Recommendations

- Continue the Commission for a two-year probationary period and require the Sunset Commission to re-evaluate the agency to ensure that needed changes have been implemented before the legislative session in 2003.
- Create a task force to guide the Commission in the implementation of these recommended changes.
- For additional technical support, add the Commission as a member of the Health Professions Council.

#### Key Findings

- The Commission lacks a functioning computer system for managing its regulatory functions, despite more than five years of attempts and two failed systems.
- The Commission cannot provide critical information to the Legislature and other state agencies.
- Based on the agency's interpretation of its statute, the Commission may not appropriately sanction violations, and could be subject to potential lawsuits in addition to its current legal problems.
- The absence of other standard licensing procedures and safeguards also impedes the agency's ability to effectively regulate the funeral industry.
- Despite agency problems, Texas has a continuing need to regulate the funeral industry to protect consumers from potentially deceptive or unfair practices.
- While transferring the Commission's functions would offer certain administrative advantages, problems could also be addressed within the current structure.

#### Conclusion

The Commission's role in regulating funerals is needed to protect consumers from potentially deceptive or unfair practices in what is often a costly and emotionally difficult experience. However, this agency has been plagued for years with serious problems in its approach to regulation, poor administration, and significant turnover in staff. While the agency's current staff appear dedicated to making needed changes, numerous problems are keeping the agency from effectively regulating the funeral industry and protecting consumers.

Due to these ongoing concerns, Sunset staff recommends continuing the agency for a two-year probationary period. Within this time frame, the agency must demonstrate significant progress in addressing a series of changes to improve its management and regulatory efforts. The creation of a task force composed of state agency, industry, and consumer representatives with needed expertise to assist the Commission is intended to help guide the agency in successfully implementing these changes.

## Support

**Current Situation:** Due to serious concerns about the Commission's administration and approach to regulation, the Legislature significantly restructured it in 1999.

- The Texas Funeral Service Commission licenses funeral directors, embalmers, and funeral establishments in Texas to ensure standards of education and professional competence. During the 76th legislative session in 1999, several bills were introduced to rectify concerns about the Commission's ineffective regulation of the funeral industry, including one to completely abolish the agency and transfer its functions to the Texas Department of Health.

The agency also faced major budgetary and performance problems, with its funding being cut altogether at one point by the House Appropriations Committee.<sup>1</sup> While the agency and

### Key Changes to the Texas Funeral Service Commission in 1999

The Legislature enacted numerous changes in the structure and operation of the Commission, including:

- increasing the proportion of public to industry members on the Commission from 5:4 to 4:2;
- requiring both the Chair and Vice Chair be selected from among the public members;
- eliminating authority for employment of an in-house general counsel;
- requiring disciplinary hearings to be held before the State Office of Administrative Hearings; and
- allowing the Commission to exempt certain funeral homes from the requirement for an embalming preparation room.

its funding survived, the Legislature made key changes to increase the Commission's accountability to both the public and the Legislature, including moving its review by the Sunset Commission before the next legislative session in 2001. For further information on these changes, see the textbox, *Key Changes to the Texas Funeral Service Commission in 1999*.

- In August 1999, due to significant turnover, the lack of an Executive Director, and an inactive Commission, the Governor's Office requested that the Texas Comptroller of Public Accounts assist the agency with its operations. The Comptroller's Office faced a backlog of 170 complaints, numerous outstanding open records requests, and a U.S. Department of Labor lawsuit concerning overtime due to 17 employees. In addition, to prepare

for its Sunset review, the agency had to hire an outside consultant to compile basic information on its history and performance because no one at the agency was able to do so.

- A new Commission was appointed in September 1999 and met for the first time in October 1999. The Commission received orientation from the funeral industry because of insufficient staff resources. After the Commission hired a new Executive Director at the end of October 1999, the Comptroller's assistance ended.

With the exception of two inspectors, the entire staff at that point were new employees. Most employees filled positions that had been vacant for some time, and had to start from scratch, without the benefit of training or any transition from previous staff. This situation was compounded by the lack of written records, policies, and procedures to guide them through their new duties.

**Problem: The Commission lacks a functioning computer system for managing its regulatory functions, despite more than five years of attempts and two failed systems.**

- The Commission's June 2000 Strategic Plan identified the need for a fully integrated system that allows for quick retrieval of licensee information and cross referencing of information. The agency's Legislative Appropriations Request in July 2000 contained a request for new computer equipment, but not the necessary software or technical assistance for a fully integrated system. As of November 2000, the agency still had no automated system in place.
- According to the Department of Information Resources (DIR), the Commission has changed directions several times during the last five years regarding the best way to meet its automation needs. The Commission contracted with DIR until 1995 for information technology, but canceled that arrangement and attempted to create its own databases.<sup>2</sup> Because of turnover and the lack of technical expertise, this approach has not worked.

DIR determined that information in the Commission's current systems cannot easily be retrieved or transferred to a new system. DIR also indicates that these systems would require Y2K remediation to ensure effective operation. However, even if these existing systems could be made operational, the agency would have difficulty maintaining sufficient technical staff or resources to successfully maintain its own automated regulatory system.<sup>3</sup>

**Problem: The Commission cannot provide critical information to the Legislature and other state agencies.**

- Commission staff cannot electronically compile standard information and statistics about licensees, complaints, and sanctions.

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DIR questions  
whether the  
Commission's  
existing computer  
systems can be made  
operational.

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Commission staff manually review files on more than 4,000 licensees to compile common statistics.

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The Commission maintains one set of hard copy files for licensing and inspections, and another set for complaint investigations. The only electronic tracking of these functions is on two separate spreadsheets. However, these spreadsheets do not clearly show the nature of the violations, and the sanctions taken to address violations.

- The lack of automation contributes to the Commission's inability to provide accurate performance data to oversight bodies that evaluate the agency's performance and determine its funding. For example, during the fiscal year 2002-2003 Joint Budget Hearing, the Commission was unable to provide basic information, such as the number of complaints the agency receives that are outside of its jurisdiction.
- Sunset staff also had difficulty evaluating the Commission's effectiveness. For example, Commission staff had to manually review files to respond to requests for common types of summary statistics, such as the number and type of sanctions taken annually. While Commission staff were accommodating, having more than 4,000 licensees meant this generally was not a tenable option.
- The State Auditor's Office cited the Commission for inaccurate data in a 1999 audit, resulting in uncertified key performance measures. According to the State Auditor, this was due to the Commission's use of a manual counting system.<sup>4</sup>
- In addition, the Commission is not assisting the Office of the Attorney General (OAG) to identify funeral directors with delinquent child support orders, as required by law. OAG tracks individuals using social security numbers and birth dates, but the Commission does not retain this information in its files. Commission staff indicated to OAG that they could not assist them without manually searching hard copy files.<sup>5</sup>

**Problem: Based on the agency's interpretation of its statute, the Commission may not appropriately sanction violations, and could be subject to potential lawsuits in addition to its current legal problems.**

- The Commission's interpretation of its enabling statute could reduce its ability to fulfill its charge to protect consumers. For example, the Commission claims it cannot prevent a dual licensee with a criminal conviction from operating, despite statutory authority to do so. In one case, a judge revoked a funeral director's license for a criminal violation of the funeral directing statute. Because the Commission claims that it cannot revoke the embalmer's license for a violation of the funeral directing statute, this person continues to work as an embalmer.

- The Commission could also be subject to potential lawsuits based on its interpretations of its enabling statute. For example, until recently, the Commission sent “letters of concern” to licensees in response to some complaints, even when no violation was found. The Commission’s statute clearly does not authorize it to issue such letters without evidence that a violation has occurred.

Another potential lawsuit involves the Commission’s unwillingness to grant any embalming preparation room exemptions to funeral homes, in spite of legislative intent. Effective September 1999, the Legislature authorized exemptions to the on-site embalming room requirement. However, the Commission voted in November 1999 not to grant any embalming room exemptions, even if funeral homes meet the statutory exemption requirements.

- The Commission repeatedly solicits basic interpretations of its statute by requesting informal opinions from its assigned assistant attorney general, who also serves six other state agencies. For example, the Commission has asked several times whether the statute allows the Commission to regulate casket sellers.

In addition, two other assistant attorneys general handle the Commission’s administrative hearings and court cases, and are burdened by the scope of two lawsuits against the Commission. The textbox, *Lawsuits Against the Commission*, provides summaries of these matters.

#### **Lawsuits Against the Commission**

*May v. TFSC* – The former Executive Director of the Commission filed suit against the Commission in March 1999. The plaintiff claims that, after reporting violations of the law, she was subject to a campaign of harassment, retaliation, intimidation, abuse, and termination.

*Reed v. TFSC* – A former employee filed this action in April 1999, claiming termination in violation of the Whistleblower Act for contacting the Office of the Governor regarding investigation of campaign contributions to the Governor’s re-election fund.

**Problem: The absence of other standard licensing procedures and safeguards also impedes the agency’s ability to effectively regulate the funeral industry.**

- The Commission has not taken advantage of the experience of more established licensing agencies regarding administrative efforts, model licensing techniques, and standardized complaint and enforcement techniques. Unlike many other licensing agencies, the agency is not part of any interagency coordinating efforts, such as the Health Professions Council. In addition, the Commission is isolated from other state agencies in its currently leased, private office space.
- The Commission annually inspects all funeral establishments, regardless of the differing risks they pose. Inspectors may spend valuable time inspecting establishments that consistently pass inspection, and have not been the subject of any consumer complaints. Meanwhile, inspectors may not have time to perform in-person follow-up visits to ensure that violations have been corrected. (See Issue 3 for more detail.)

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The Commission has not taken advantage of the experience of more established licensing agencies.

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- The Commission lacks a formal system to handle complaints according to severity. Thus, the agency cannot ensure that it identifies and acts on problems needing immediate attention, before handling more routine complaints. (See Issue 3 for more detail.)
- The Commission's complaint process lacks appropriate avenues for appeal. The same Commission members who initially decide a case also hear the appeal on the same decision. This process creates an opportunity for bias, giving the appearance of an unfair appeal structure. (See Issue 4 for more detail.)
- Although not required by law or rule, staff present every case to the Commission, because the agency does not have a procedure to administratively dismiss complaints. Because of this process, dismissing a case takes months or even longer, an unnecessarily long time for complainants and licensees to learn of the dismissal. (See Issue 4 for more detail.)
- The Commission does not have appropriate guidelines in place for fines and sanctions. Without clear guidelines and records, the Commission may be open to potential litigation over arbitrarily and inconsistently assessed sanctions and fines. (See Issue 5 for more detail.)

**Need for Agency Functions: Despite agency problems, Texas has a continuing need to regulate the funeral industry to protect consumers from potentially deceptive or unfair practices.**

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Funerals are costly and emotionally difficult, making consumers particularly open to harm from deceptive or unscrupulous practices.

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- Funeral purchases can be some of the most costly and emotionally difficult financial transactions a consumer can make.<sup>6</sup> Close to 50 percent of all consumers have never arranged a funeral, while another 25 percent have done so only once. According to consumer groups, funerals are the third largest lifetime expenditure for many consumers, and one of the key concerns of the elderly.<sup>7</sup> In 1999, the average funeral in Texas cost about \$5,000.<sup>8</sup>  
Without regulation, Texans would be open to potentially deceptive or unscrupulous funeral practices and have no means for rectifying such problems other than through the courts.
- The federal government reinforces the need for funeral industry regulation by requiring states to adopt the Federal Trade Commission's "Funeral Rule." This rule applies in a state unless the state can prove to the FTC that state law provides equal or greater protection. Texas has applied several times and has never been granted an exemption.<sup>9</sup> The textbox, *FTC Rule on Funeral Industry Practices*, provides an explanation of the Funeral Rule.
- While the Funeral Rule was designed to help ensure consumer protection, no federal laws regulate any aspect of the funeral

industry. Additionally, the U.S. General Accounting Office determined that FTC has no means in place to assure or measure funeral home compliance with the rule.<sup>10</sup>

**Need for Agency Structure: While transferring the Commission's functions would offer certain administrative advantages, problems could also be addressed within the current structure.**

- Sunset staff considered several organizational alternatives to address the problems outlined above without additional costs to the State. For example, the Commission's functions could be transferred to the Texas Department of Licensing and Regulation (TDLR). The Legislature created TDLR in 1989 as the State's umbrella agency to oversee regulation of businesses, trades, and occupations.<sup>11</sup>

TDLR offers many of the support functions needed by the Commission, such as licensing, computer, and legal services. While a transfer to TDLR would present a cost-effective way to address many of the Commission's problems, consumer and industry groups raised concerns about TDLR's lack of a proven consumer focus and the amount of attention that funeral regulation would receive, as one of 15 industries overseen by the agency.

- Another option was transferring the functions to the Texas Department of Health (TDH). Although TDH could provide much needed administrative support, it is still working to improve many of its licensing functions. As a result, benefits were insufficient to justify such a transfer at this time.
- The Legislature indicated support for a stand-alone funeral regulatory agency in 1999 by restructuring the Commission, rather than abolishing it or transferring its functions. Sunset staff also determined that many agency problems resulted from a long history of turnover and instability, but not necessarily from the Commission's structure as an independent agency.

Thus, the recommendations in this report aim to address problems within the current agency structure. This approach would allow the Legislature to see what the agency needs to function well. This approach would also provide the Commission with a roadmap and the necessary tools for making the changes needed to justify its

**FTC Rule on Funeral Industry Practices**

The Federal Trade Commission states that regulation of the industry is necessary because funerals involve important social considerations and consumers are often forced to make expensive purchases under tight time constraints and emotional duress. The Funeral Rule is designed to protect consumers from unscrupulous business practices and requires that:

- providers of funeral goods and services give consumers itemized price lists of goods and services offered;
- the price lists must state that the consumer has the right to select only the goods and services desired (except for those that may be required by law); alternative containers are available for direct cremations; and the only fee that a consumer can be required to pay is a basic services fee;
- price information be supplied over the telephone if requested;
- funeral providers cannot claim that their goods or services will delay the decomposition of human remains indefinitely;
- funeral providers cannot claim that laws or certain cemeteries require the purchase of any funeral goods or services; and
- funeral providers disclose that embalming is not required and must be authorized by a family member.

continued independence. However, without an increase in funding and outside assistance, the Commission is unlikely to be able to effectively fulfill its mission.

## Recommendation

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### Change in Statute

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#### **1.1 Continue the Commission for a two-year probationary period and require the Sunset Commission to re-evaluate the agency to ensure that needed changes have been implemented before the legislative session in 2003.**

This recommendation would maintain the Commission as a stand-alone agency, but for two years, rather than for the standard 12-year period. Sunset staff would perform a limited review in 2002 to evaluate whether the Commission has shown significant progress in addressing the problems raised in this report, using the following criteria:

- Development and implementation of a contract with the Department of Information Resources to improve information technology.

The Commission would be required to enter into a temporary contract with the Department of Information Resources (DIR) to assess, determine, and implement significantly improved technological resources. The Legislature should consider appropriating funds for the first year, one-time costs of this recommendation directly to DIR. Thereafter, the costs of maintaining new technologies should be appropriated to the Commission and paid to DIR under contract.

At the end of the contract, Commission staff would be responsible for continuing the successful implementation of any and all new hardware and software. The Commission would need to prove that its information technology has significantly improved to ensure that the Commission could compile standard information and statistics, such as:

- data about licensees, complaints, and sanctions, such as the number of new individual versus dual licenses issued;
  - the number of complaints received that are outside of the Commission's jurisdiction;
  - the average cost of complaints resolved;
  - summaries of violations and actions taken; and
  - the necessary information to help the Office of the Attorney General enforce delinquent child support orders among funeral industry licensees.
- Development and implementation of a contract for legal services with the Office of the Attorney General.

The contract should provide for dedicated legal services for one year, specify the scope of services, and establish the amount that the Commission would pay OAG. OAG has similar contracts with

many other state agencies. The assigned attorney should help the Commission implement rules, policies, procedures, and changes outlined in this report, so that the agency could operate with less direct assistance after the contract ends. This recommendation would ensure adequate access to legal services, including consultation about the daily operations of the agency, and correct interpretations of the Commission's enabling statute.

- Effective implementation of the recommendations contained in other issues of this report, including the adoption of:
  - a risk-based approach to scheduling inspections and investigating complaints (see Issue 3);
  - formal rules outlining a complaint process that ensures an open and fair system (see Issue 4); and
  - clearer guidelines that ensure a more effective use of fines and sanctions (see Issue 5).

The Commission should develop an action plan by December 1, 2001 to detail how the Commission will carry out the tasks outlined above. This would include prioritizing the tasks, identifying “quick fixes,” estimating costs, and providing a time frame for implementation. The Commission should also be required to update the Sunset Commission by September 1, 2002 on the status of these recommendations as part of the re-evaluation of the agency during the next interim. If the Commission has not made substantial progress, the Sunset Commission should consider a recommendation to abolish the Commission and transfer its functions to the Texas Department of Licensing and Regulation.

### **1.2 Create a task force to guide the Commission in the implementation of these recommended changes.**

Because the Commission needs additional expertise to implement the criteria defined above, this recommendation would create a task force to assist the Commission. The task force would be charged with reviewing the Commission's action plan, and guiding and monitoring the implementation of recommended changes. In particular, the task force should focus on helping the Commission with automation, legal, and enforcement structures for effective regulation. The Commission would provide quarterly status reports on its progress to the task force and to the Sunset Commission.

The six-member task force would be chaired by a representative of the Comptroller of Public Accounts, and consist of representatives from the Department of Information Resources, Office of the Attorney General, and Office of the State Auditor. The Comptroller's Office would also select one representative of the funeral industry, and one consumer representative. This cross-section of state agency, funeral industry, and consumer representatives would provide the Commission with expertise in establishing an effective regulatory structure. The task force should meet at least monthly, and would expire in January 2003, when the 78th Legislature convenes.

### **1.3 For additional technical support, add the Commission as a member of the Health Professions Council.**

This recommendation would allow the Executive Director to interact with and benefit from the experience of other licensing agency directors. The Health Professions Council was created to enable directors of licensing agencies to share administrative efforts, identify model licensing techniques, standardize complaint and enforcement techniques, and ensure new board members receive

appropriate training. The Council consists of representatives from health care licensing boards, including the Board of Medical Examiners, Board of Nurse Examiners, and Board of Veterinary Medical Examiners. Many of these boards are co-located in the same state office building, facilitating communication and coordination.

## **Management Action**

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### **1.4 The Commission should seek to relocate to the William P. Hobby State Office Building.**

The Commission currently leases space in a private office building, and this lease will end in May 2001. The Commission should request that the General Services Commission move the agency into the Hobby Building. Because many of the licensing agencies of the Health Professions Council are located in this building, this recommendation would facilitate coordination with these agencies. If no space in the Hobby Building is available, the Commission should seek space with or near other state licensing agencies.

## **Impact**

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Maintaining the Commission as an independent agency is intended to help ensure strong consumer protection and specialized regulation. However, working within the current framework without significantly improved expertise and additional resources, the Commission cannot effectively protect consumers and regulate the industry. Contracting with DIR and OAG to provide the Commission with technological and legal support would help establish a structure that ensures stability and continuity, regardless of future staff turnover and lack of technical expertise. The task force would help ensure the expertise necessary to begin implementing recommended changes during the Commission's probationary period, and membership in the Health Professions Council would help ensure ongoing access to expertise and assistance with general administrative and regulatory functions.

These recommendations provide a framework to address the overall concerns with the agency's regulatory and management problems. Successful implementation of an improved structure is critical to the effectiveness of the Commission, but will take some time. While the Commission has taken initial steps to improve its regulation and management, these recommendations should help the Legislature eventually decide if the current independent agency approach can be successful.

## **Fiscal Implication**

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These recommendations would not have a net fiscal impact to the State. The costs associated with these recommendations should be covered by licensing fee revenue. The Commission recently raised licensing fees and estimates an increase in revenue of about \$206,000 per year. The Legislature could use these revenues to help offset the cost of these recommendations.

The Department of Information Resources estimates that the cost of providing regulatory application programming and operations support to the Commission would be a one-time cost of \$240,148. This includes the costs of a contracted project manager, trainer, and Y2K remediation. Ongoing maintenance costs are estimated at \$19,200 per year. Sunset staff recommends that these funds be directly appropriated, by rider, to the Department of Information Resources. The contract between

the Commission and the Office of the Attorney General would specify that the Commission would be responsible for paying the salary of an experienced, full-time assistant attorney general for one year. Based on the state salary schedule, the one-time cost to the State would be \$54,264. The Health Professions Council estimates the cost of Commission membership on the Council would be about \$2,100 per year. While not included in the estimate below, the State would save about \$38,000 per year if the Commission moves into state office space. Should the Legislature continue the Commission, the Commission's appropriation of about \$500,000 per year would also continue.

<b>Fiscal Year</b>	<b>Cost to General Revenue</b>	<b>Gain to General Revenue</b>	<b>Change in FTEs from FY 2001</b>
2002	\$296,512	\$296,512	0
2003	\$21,300	\$21,300	0
2004	\$21,300	\$21,300	0
2005	\$21,300	\$21,300	0
2006	\$21,300	\$21,300	0

<sup>1</sup> C.S.H.B. 2756 76(R) House Committee Report - Bill Analysis.

<sup>2</sup> Interview with Texas Department of Information Resources, (Austin, Texas, November 1, 2000).

<sup>3</sup> *Regulatory Systems and Requirements & Comparative Analysis: Final Report Executive Summary*, prepared by Abdeladim & Associates, August 2000, p. 3.

<sup>4</sup> Office of the State Auditor, *An Audit of Management Controls at the Funeral Service Commission*, April 1999, p. 2. The Auditor's Office was unable to certify the performance measures for the number of new licenses issued to individuals and the average cost per complaint received.

<sup>5</sup> Office of the Attorney General, email to Sunset Advisory Commission, September 2000. Sunset staff were told that the Commission did not save social security numbers or birth dates in the licensing database, the two pieces of information that the OAG uses to track down individuals in child support cases.

<sup>6</sup> U.S. General Accounting Office, *Funeral-Related Industries: Complaints and State Laws Vary, and FTC Could Better Manage the Funeral Rule* (Washington, D.C., September 1999), Report No. GAO/GGD, p.1.

<sup>7</sup> Interviews with representatives of the American Association of Retired Persons and Consumers Union, (Austin, Texas, September and October, 2000).

<sup>8</sup> Texas Funeral Service Commission, *Agency Strategic Plan for the 2001-2005 Period*, (Austin, Texas, June 2000), p. 8.

<sup>9</sup> Interview with Consumers Union, (Austin, Texas, October 25, 2000).

<sup>10</sup> U.S. General Accounting Office, *Funeral-Related Industries: Complaints and State Laws Vary, and FTC Could Better Manage the Funeral Rule* (Washington, D.C., September 1999), Report No. GAO/GGD-99-156.

<sup>11</sup> Governor's Special Committee on Organization of State Agencies, *Special Report*, 1988; and Texas Performance Review, *Breaking the Mold, New Ways to Govern Texas* (Austin, Texas, Comptroller of Public Accounts, 1991).





## Issue 2

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### **The Commission Does Not Provide Adequate Information to Consumers or Funeral Professionals.**

#### **Summary**

##### **Key Recommendations**

- The Commission should add consumer information to its Web site, including information on funeral prices and sanctions taken by the agency.
- The Commission should provide information to industry members to keep them informed of changes and activities of the Commission.

##### **Key Findings**

- Insufficient information contributes to a lack of consumer awareness about the Commission and common problems to avoid in arranging a funeral.
- Insufficient and unclear information contributes to funeral industry professionals not understanding licensing requirements and being unaware of changes in the law and rules.

##### **Conclusion**

The limited information provided by the Commission can make it hard for consumers to plan a funeral and know where to complain if they have a problem, and for funeral professionals to know what is expected of them. The Sunset staff evaluated the quality and accessibility of the information provided by the Commission. Sunset staff identified actions that would help the Commission better educate consumers about funeral planning and complaint options, and professional members about funeral service regulations.

## Support

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**Current Situation:** The Commission provides limited information to both the public and the industry.

- State law requires the Commission to publish a brochure, *Facts about Funerals*, for the public that explains matters relating to funerals, the functions of the Commission, and procedures for filing and resolving complaints. The brochure is available in English and Spanish. Commission rules require all funeral homes in Texas to display this brochure and to give a copy to customers at the beginning of funeral planning discussions. The statute also requires the Commission to establish other methods for notifying consumers about the Commission for complaint purposes, including putting agency information on license forms, contracts, and bills. Finally, the Commission is required to provide quarterly updates on the status of complaints to those involved in the complaints.
- By law the Commission is required to give funeral professionals only exam results, warnings or reports of violations, and information on complaint status. However, the Commission does produce brochures about continuing education requirements and provisional licensing, and a book containing governing laws and Commission rules.<sup>1</sup> The Commission also sends a letter of explanation with each application renewal form.
- The Commission launched a Web site in 2000 that allows the public to file a complaint online and download the rules and regulations. The site additionally provides some industry information such as license fees and rule changes. The Commission also began a toll-free telephone number in 2000.

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Almost half of the consumer responses to a survey by Sunset staff indicated that the Commission does not make agency information easily available to the public.

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**Problem:** Insufficient information contributes to a lack of consumer awareness about the Commission and common problems to avoid in arranging a funeral.

- Consumers groups complain that the Commission conducts no consumer outreach. A survey conducted by the American Association of Retired Persons (AARP) found that most of its members would turn to the Better Business Bureau or Attorney General's Office if they suspected deceptive funeral or burial practices.<sup>2</sup> Almost half of the consumer responses to a survey by Sunset staff indicated that the Commission does not make agency information easily available to the public. Several respondents said they were not aware of the Commission until they wanted to file a complaint.<sup>3</sup>

- The Commission's Web site currently contains very little consumer information. For example, it provides no information on planning a funeral, such as information on what a consumer might expect to pay for particular services. Consumer groups have suggested that the State could enhance consumer protection by improving consumer awareness of the wide range of prices paid for similar services. The Web site also offers no method to search for information on licensees to determine if they have a valid license or have been sanctioned.
- Some industry members also recognize a lack of public awareness and believe consumers need more information about funeral planning and the complaint process. For example, a Sunset staff discussion with mortuary school officials revealed that they are considering public service announcements and television appearances to increase awareness about funeral planning.<sup>4</sup>

**Problem: Insufficient and unclear information contributes to funeral industry professionals not understanding licensing requirements and being unaware of changes in the law and rules.**

- The Commission does not automatically mail a copy of its laws and rules to new licensees—they must request copies. Also, the Commission's book of laws and rules, a large bound volume, is not current and not easily updated. Because it only contains actual reproductions of all relative codes and rules, it does not provide plain-language materials to funeral professionals about what is required or prohibited by law.
- Almost one-third of the industry members who responded to the Sunset staff survey said that they are not getting sufficient and timely information from the Commission.<sup>5</sup> While private organizations such as the Texas Funeral Directors Association and the Independent Funeral Directors Association, Inc. may attempt to notify their members about changes in laws or rules and other industry news through monthly magazines and fax alerts, nothing assures that licensees get consistent or timely information, especially since not all licensees belong to an association.

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The Commission does not provide adequate information to funeral professionals about what is required by law.

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**Comparison: Agencies in other states and in Texas provide consumers and industry with more substantive and easily understood information.**

- California's Cemetery and Funeral Bureau, at its Department of Consumer Affairs, has a downloadable guide to funeral and cemetery purchases on its Web site that contains consumer advocacy and planning information, as well as a glossary of terms. Both California's and Florida's Web sites allow consumers to search for licensees to determine if complaints have been filed against them.

- Missouri's State Board of Embalmers and Funeral Directors, at its Division of Professional Registration, produces a quarterly newsletter announcing proposed amendments, new legislation, complaint handling and discipline, and other industry-specific information.
- Other Texas agencies use the Internet to provide consumers with information on licensees and price comparisons. For example, the Texas Department of Licensing and Regulation (TDLR) has a Web site that permits searching for licensees, and shows if the license is current and any sanctions that have been imposed.<sup>6</sup> TDLR also provides subscriber lists that electronically send information updates to those who request them. The information may include press releases and changes in industry rules. The Texas Department of Insurance Web site provides price comparisons from across the state for auto, home and other types of insurance.<sup>7</sup> The site also shows insurance companies' complaint indexes and financial ratings.

## Recommendation

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### Management Action

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#### **2.1 The Commission should add consumer information to its Web site, including information on funeral prices and sanctions taken by the agency.**

This recommendation would give the public easy access to funeral planning and complaint information. The Commission should reproduce an updated *Facts about Funerals* brochure on its site. Categories of sanctions that are imposed on the industry should be posted. Finally, price list survey information from a sample of funeral homes across the state should also be included. The survey should include a statewide range and a statewide average of prices for standard items such as direct cremation, immediate burial, full funerals, caskets, embalming, alternative containers, rental casket, and the funeral director's fee. All funeral establishments are required to have printed price lists that the Commission could collect for this survey. Private organizations such as burial societies already provide some of this information, and the Commission should work with them to avoid duplication of effort.

#### **2.2 The Commission should provide information to industry members to keep them informed of changes and activities of the Commission.**

This recommendation would help to ensure that industry professionals are well informed about funeral regulations and pending changes. The materials should include:

- a clear, plain-language brochure that explains the responsibilities of funeral service professionals, including continuing education and licensing requirements, prohibited practices, and types of administrative penalties; and

- information alerts, in either electronic or print format, that are sent periodically to industry members. The alerts should contain information on relevant legislation, complaints, and disciplinary actions taken by the Commission. The Commission should request e-mail addresses on its license applications to allow electronic communication with its licensees when possible.

## Impact ---

Providing more comprehensive information that is easier to understand and more accessible should help consumers make better funeral decisions and let them know that they can complain to the Commission if they receive poor service. Improved information should also help the Commission establish better public confidence.

Keeping industry members better informed should help them avoid unwitting mistakes. Posting sanctions on the Commission's Web site should serve as a deterrent to funeral industry providers by making them aware of unacceptable behavior.

## Fiscal Implication ---

These recommendations would have a fiscal impact on the State. Both of these recommendations could be accomplished through a contract with a consultant. For example, the Commission's current Web site contract costs the agency \$150 an hour to update text. Costs were not estimated for this report but should not exceed \$10,000.

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<sup>1</sup> Texas Funeral Service Commission, *Governing Laws and Commission Rules*, (Austin, Texas, September 1999).

<sup>2</sup> Interviews with representatives of the American Association of Retired Persons, Consumers Union, Austin Memorial and Burial Society, and Public Citizen, Inc. (Austin, Texas, September and October 2000).

<sup>3</sup> Sunset survey of funeral industry professionals, complainants and other parties who have been involved with the Texas Funeral Service Commission, August - October 2000.

<sup>4</sup> Sunset staff discussion with mortuary school officials, Texas Funeral Service Commission Board meeting (Austin, Texas, September 26, 2000).

<sup>5</sup> Sunset survey of funeral industry professionals, complainants and other parties who have been involved with the Texas Funeral Service Commission, August-October 2000.

<sup>6</sup> Texas Department of Licensing and Regulation, *Database Directory*, [http://www.license.state.tx.us/MISC/database\\_directory.htm](http://www.license.state.tx.us/MISC/database_directory.htm). Accessed: October 18, 2000.

<sup>7</sup> Texas Department of Insurance, *Consumer Information from the Texas Department of Insurance*, <http://www.tdi.state.tx.us/consumer/indexc.html>. Accessed: October 18, 2000.



## Issue 3

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### **The Commission Lacks Certain Key Components to Effectively License, Inspect, and Investigate Complaints Against Funeral Directors and Embalmers.**

#### **Summary**

##### **Key Recommendations**

- Remove the requirement for annual inspections of all funeral establishments, and require the Commission to base inspections on a risk assessment tool.
- Expand the Commission's authority to stagger the renewal of individual licenses to include establishment licenses.
- The Commission should implement a complaint resolution system that ranks complaints according to the order of initial receipt and severity of the alleged violation.

##### **Key Findings**

- The annual inspection requirement does not allow the Commission to target its limited resources for conducting effective on-site visits.
- The Commission experiences an excessive workload during each license renewal period.
- The Commission may misallocate its efforts and resources because it lacks a formal system to handle complaints according to severity.

##### **Conclusion**

The Sunset staff evaluated how the Commission performs its licensing, inspection, and complaint investigation functions, and found that certain tools would enable the agency to better manage these processes. A staggered license renewal system would help to more evenly balance the Commission's workload throughout the year, allowing more time to ensure accuracy and to meet the needs of licensees. Adopting a risk-based approach to scheduling inspections and investigating complaints would also free up resources so the Commission can focus on addressing violations and responding to consumers' issues.



## Support

### Inspections

**Current Situation:** The Commission is required by law to annually inspect all funeral establishments in Texas.

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Over 93 percent of the funeral establishments inspected in fiscal year 2000 did not have any violations.

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- The Commission's statute requires it to annually inspect all funeral establishments in Texas. Agency inspectors perform surprise inspections, which may last as few as 15 minutes or as much as several hours. The inspector checks for items such as a casket display room, a preparation room with hot and cold running water, and consumer rights information. The inspector also notes whether prior violations have been corrected.

At the end of the inspection, the inspector explains the exceptions noted and leaves a copy of the inspection checklist. The establishment has 15 days to submit a report explaining how it will address any deficiencies. The agency sometimes schedules a re-inspection for more flagrant violations, such as unsanitary conditions. Like regular annual inspections, re-inspections are unannounced. If the Commission is not satisfied with an establishment's compliance, the agency may bring enforcement action against that business.

- In fiscal year 2000, the agency inspected 97.5 percent of the 1,309 licensed funeral establishments in Texas. Over 93 percent of the establishments inspected that year did not have any violations, and the Commission estimates that 96 percent will not have violations in fiscal year 2001.

**Problem:** The annual inspection requirement does not allow the Commission to target its limited resources for conducting effective on-site visits.

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Two inspectors must visit more than 1,300 funeral establishments annually, covering as many as 18 in one day.

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- The Commission has two inspectors to visit more than 1,300 funeral establishments located throughout the state. An inspector may visit as many as 18 establishments in one day.
- The Commission is misplacing its efforts. A 1997 State Auditor's Office report noted that the Commission did not monitor or use repeat violation information to determine whether violators continue to commit the same offenses.<sup>1</sup> Because inspections are performed based on scheduling concerns such as location rather than on which establishments have committed past violations, the Commission may not spend enough time inspecting establishments that require more attention.

In addition, the Commission does not have time to effectively help funeral homes meet the inspection requirements, or perform in-person follow-up visits to ensure that violations have been corrected. Because of the weak link between the inspection and investigation functions (see Issue 1), inspectors also lack the tools to ensure that repeat violators receive more thorough inspections and assistance.

At the same time, inspectors spend valuable time inspecting establishments that may not require an annual physical review. A large number of funeral homes consistently pass inspection without any violations, and have not been the subject of any consumer complaints. For example, in fiscal year 2000, violations were found in only seven percent of the establishments inspected.

- Office of the State Auditor staff have recommended that the Commission adopt a tool that allows the agency to determine which funeral homes to inspect every year, based upon high, medium, and low risk grades.<sup>2</sup> Other state agencies, such as the Department of Licensing and Regulation, successfully use risk assessment tools to determine which types of facilities pose the greatest risk to the consumer, and establish inspection schedules based on that risk. The Texas Department of Health also uses a matrix to determine how frequently it inspects retail food establishments.

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State Auditor's Office  
staff recommend  
using an inspection  
schedule based on  
risk.

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## Licensing

**Current Situation: The Commission's license renewal process does not evenly spread the workload throughout the year.**

- Funeral director and embalmer licenses are renewed in either May or November, depending on the month in which the person first received a license. Licensees must submit a renewal application and prove that they have met continuing education requirements. Staff review the application and the licensee's record of compliance with the Commission's statute and rules, as well as any felony conviction record. Unless problems are found, the Commission renews the licenses for a two-year period. Provisional licensees must apply for renewal of their licenses each January.
- By law, funeral establishment and commercial embalming establishment licenses expire on September 30 of each year. After checking the establishment's inspection and complaint history, the Commission issues a renewed license for a one-year period. The Commission renewed 2,340 funeral director and embalmer licenses, 101 provisional licenses, and 1,540 establishment licenses in fiscal year 2000. The number of establishment renewal licenses processed includes renewal applications and fees that were not processed in fiscal year 1999.

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Although authorized to do so, the agency has not opted to stagger individual license renewals.

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**Problem:** The Commission experiences an excessive workload during each license renewal period.

- The Commission faces huge surges in the workload at certain points each year. This challenges the Commission's ability to manage the influx of renewals while performing many other important tasks. In an effort to process renewals quickly, staff may make costly errors, such as not issuing a person the correct license, or not collecting the right fee amounts.
- The Commission's enabling statute authorizes it to stagger the renewal of funeral director and embalmer licenses, but it has not opted to take advantage of this alternative. In comparison, many other professional licensing agencies, such as the Real Estate Commission and the State Board of Public Accountancy, use a staggered licensing procedure to avoid backlogs, which can interfere with other responsibilities. Generally, agencies renew licenses based on the licensee's birth date, which more evenly spreads the workload throughout the year.

## Complaints

**Current Situation:** The Commission generally handles consumer complaints in the order received.

- In fiscal year 2000, the Commission reviewed 355 complaints, clearing out a significant backlog from prior years. The 355 cases included 12 complaints received in fiscal year 1998, 180 received in fiscal year 1999, and 163 received in fiscal year 2000. The Commission closed 318 cases of the 355 cases reviewed, carrying forward 37 cases into fiscal year 2001.
- The Commission generally tracks these complaints in the order of their receipt. As discussed in Issue 4, staff present every case to the Commission before final resolution. The average time to resolve a complaint is between six to eight months.

**Problem:** The Commission may misallocate its efforts and resources because it lacks a formal system to handle complaints according to severity.

- As a matter of practice, staff may decide to present a case to the Commission based on the severity of the alleged violation, regardless of when the complaint was received. However, no formal system helps the staff determine when such action is appropriate.

In addition, the Commission generally meets every other month. Thus, severe and time-sensitive problems, which need to be addressed quickly, may not receive appropriate attention from the agency. For example, a complaint may involve a funeral director who refuses to

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The Commission averages six to eight months to resolve a complaint.

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perform services provided for in a contract, or who wants to release a body to an unauthorized party. In these cases, immediate agency involvement could help resolve the situation before any harm is done. On the other hand, a complaint about too few chairs at a funeral that occurred three months ago would not warrant immediate attention.

- As part of a random survey conducted by Sunset staff, many complainants reported they did not think the Commission fully considered their complaints, and felt left out of the process.<sup>3</sup> Spending time on complaints that may not deserve immediate attention limits investigators' effectiveness in getting necessary information from complainants and licensees on more serious complaints. This also affects the agency's ability to provide the parties with updates on case status (see Issue 2 for further discussion about providing information to complainants and licensees).
- In comparison, other agencies use formal systems of complaint resolution that assess severity and track response time to ensure that complaints do not stagnate, and that problems needing immediate attention are handled promptly. For example, the Board of Nurse Examiners has a rule that defines four levels of case priority status and requires a timeline for case completion.

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More immediate  
agency involvement  
could help resolve  
problems before  
further harm is done.

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## Recommendation

### Change in Statute

#### **3.1 Remove the requirement for annual inspections of all funeral establishments, and require the Commission to base inspections on a risk assessment tool.**

This recommendation would ensure that the Commission spends its limited time and resources inspecting facilities that require the most attention. The Commission should ensure that each establishment receives an inspection at least once every five years. Many other state agencies use risk assessment tools to guide inspections, so the Commission has many examples on which to model its approach.

#### **3.2 Expand the Commission's authority to stagger the renewal of individual licenses to include establishment licenses.**

Under this recommendation, the Commission should adopt a system under which both individual and establishment licenses expire during various dates of the year, such as on licensees' birth dates. A staggered system would prevent the agency from being overwhelmed with license renewals at certain times of the year. This recommendation would also entail removing the requirement that funeral establishment licenses expire on September 30 of each year.

## Management Action ---

### **3.3 The Commission should implement a complaint resolution system that ranks complaints according to the order of initial receipt and severity of the alleged violation.**

The Commission should review its categories of offenses and establish a hierarchy to handle complaints. This recommendation would ensure consumer complaints are responded to appropriately, based on when they are received and the immediacy of the problem presented.

## Impact ---

These recommendations would help the Commission more effectively use limited staff resources. The recommendations would also allow for more thorough inspection, licensing, and investigation processes. By focusing efforts to help establishments fix inspection violations on the front end, the number of complaints against those facilities should decline.

## Fiscal Implication ---

These changes would not have a fiscal impact to the State. Staff would have the ability to better prioritize their time to focus on the most critical aspects of agency operations.

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<sup>1</sup> Office of the State Auditor, *1997 Small Agency Management Control Audit* (Austin, Texas, August 1997).

<sup>2</sup> Interview with Office of the State Auditor (Austin, Texas, August 24, 2000).

<sup>3</sup> Sunset staff survey of funeral industry professionals, complainants, and other parties who have been involved with the Texas Funeral Service Commission, August-October 2000.

## Issue 4

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### **The Commission's Complaint Process Wastes Limited Agency Resources and Lacks an Effective Appeal Structure.**

#### **Summary**

##### **Key Recommendations**

- Require the Commission to adopt rules that comprehensively outline a complaint process.
- Remove the provision authorizing Commission member participation in informal hearings.

##### **Key Findings**

- The Commission does not provide licensees and consumers with meaningful opportunities to participate in the complaint process.
- Staff cannot dismiss baseless cases without Commission member approval, causing a lengthy dismissal process that burdens staff, Commission members, complainants, and licensees.
- The agency's complaint process subjects licensees to an unfair appeal structure.

##### **Conclusion**

The Commission does not have formal rules outlining a complaint process, and its current procedures do not ensure that complainants and licensees have an open and fair system in which to participate. In addition, this process unnecessarily places burdens on the Commission members and agency staff. This recommendation should provide people with meaningful opportunities to participate in the complaint resolution process, and allow the Commission to better focus its efforts on investigating and resolving cases.

## Support

**Current Situation:** The Commission does not have formal rules outlining a process to address complaints against the funeral industry.

- Unlike most other agencies, the Commission does not have a set of formal rules that define a complaint procedure. Instead, the agency's rules cover a few areas that relate to complaints, such as the public nature and the location of hearings. The agency's statute also refers to the Administrative Procedure Act, which provides only minimum standards of uniform practice and procedure, such as hearing notice and rulemaking requirements.
- To guide agency employees through the complaint process, the Commission has a staff procedures manual that describes a complaint process. Under this process, the Commission receives complaints against licensees and must formally dismiss those without allegations of misconduct. The staff investigates actionable complaints, and presents a summary of each case to the Commission at a public meeting. Based on the Executive Director's recommendation, Commission members make an initial determination of either fault or no fault. If the Commission finds fault, the Executive Director later assesses a penalty and notifies the licensee. Within 30 days, the licensee must pay the fine, request an informal hearing, or request a formal hearing.

If the licensee chooses an informal hearing, the statute allows two Commission members to meet with the licensee to discuss the case. If the licensee chooses a formal hearing or is dissatisfied with the decision in the informal hearing, a formal hearing before an administrative law judge of the State Office of Administrative Hearings may be held. The Administrative Procedure Act governs procedures for formal hearings. The full Commission makes the final decision after an informal or formal hearing. The flowchart, *Complaint Process*, details the agency's complaint process.

**Problem:** The Commission does not provide licensees and consumers with meaningful opportunities to participate in the complaint process.

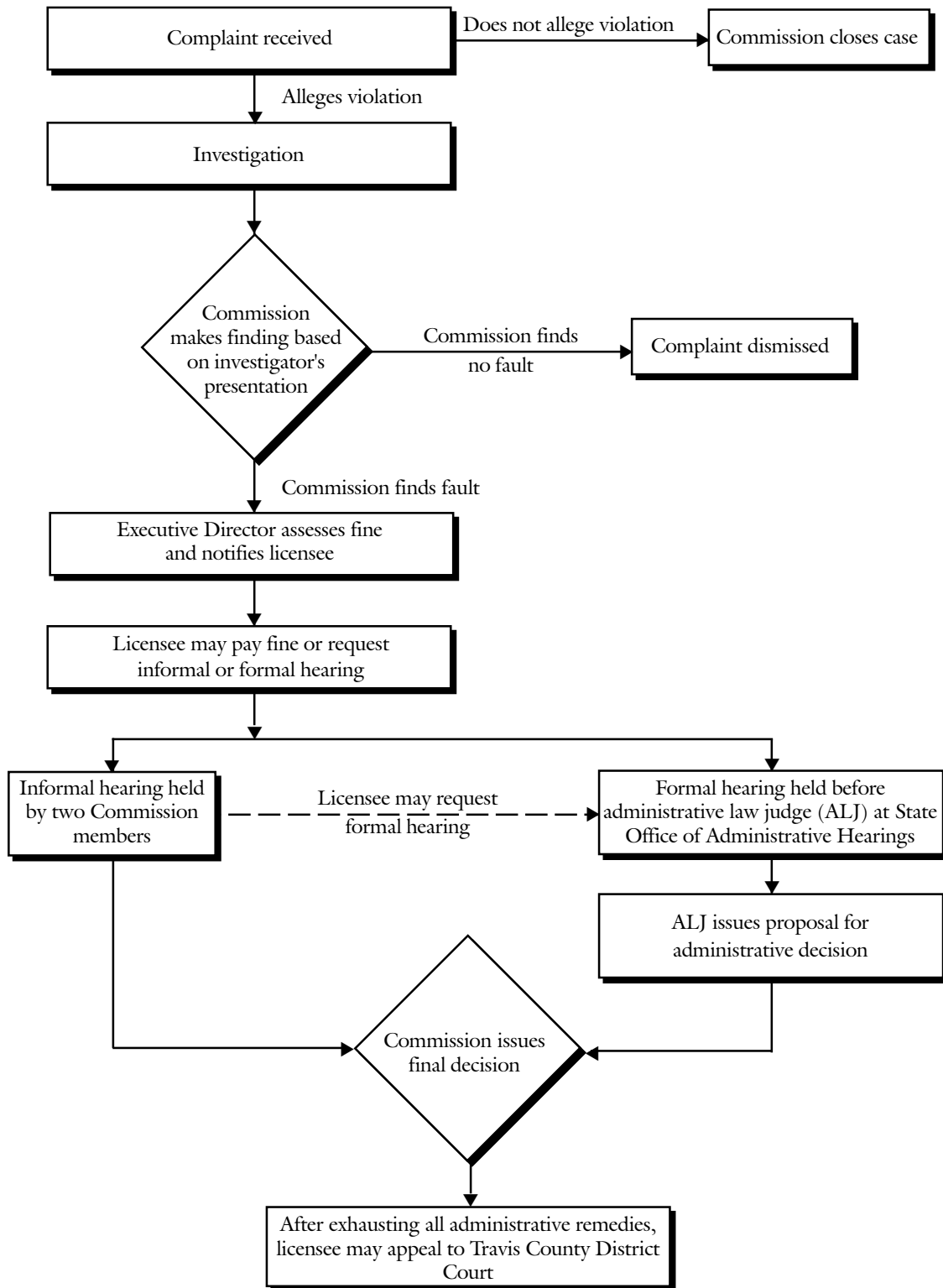
- Both complainants and licensees have reported that the Commission does not provide adequate notice before meetings. Consumers have received notice of public meetings on their complaints either within a few days before the public meeting, or even after the date.<sup>1</sup> One complainant received notice on the day of the public meeting, an hour after the meeting had started.<sup>2</sup>

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Both complainants and licensees have reported that the Commission does not provide adequate notice before meetings.

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### Complaint Process





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The Commission's policies on public testimony may cause complainants and licensees to feel their input does not make a difference.

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- The Commission's policies on public testimony at its public meetings may cause complainants and licensees to feel that their input does not make a difference. The Commission generally requires all public testimony, including comments about pending cases, at the beginning of the meeting, rather than as the Commission considers each complaint. This practice forces people to predict areas of discussion instead of delivering relevant comments that address Commission and staff concerns, and forces Commission members to vote on cases without the benefit of tailored input.

The Commission's two-minute time limit on testimony also gives the perception that the Commission does not value input from complainants and licensees. The Commission imposes this time limit despite the fact that very few people sign up to speak at each meeting.

**Problem:** Staff cannot dismiss baseless cases without Commission member approval, causing a lengthy dismissal process that burdens staff, Commission members, complainants, and licensees.

- Although not required by law or rule, staff present every case to the Commission, because the agency does not have a procedure to administratively dismiss complaints. For example, after performing an investigation of a complaint against a funeral home, staff may find that the complaint clearly does not allege a violation of the agency's statute, but the investigator must wait until the next Commission meeting to recommend dismissal.

Because of this process, dismissing a case takes months or even longer, an unnecessarily long time for complainants and licensees to learn of the dismissal. Reviewing the case files and voting on baseless complaints also takes up valuable Commission members' time.

- Staff investigators present an average of 30 to 40 complaints at each Commission meeting, which can take up to one-and-a-half hours, without much Commission discussion. Many people told Sunset staff that Commission members appear unfamiliar with cases, and "rubber stamp" staff recommendations of whether or not to find fault, despite the fact that Commission members receive case summaries a few days before public hearings.
- In October 2000, the Commission adopted a policy to allow staff to transfer complaints to appropriate agencies with the approval of the Executive Director, but this policy does not address complaints for which no state agency has jurisdiction. For example, staff could refer a complaint about prepaid funeral services to the Department of Banking without Commission action. However, a complaint about a casket sale, which is not regulated by any state agency, still would have to be presented to the Commission for dismissal.

**Problem: The agency’s complaint process subjects licensees to an unfair appeal structure.**

- Rather than only hearing a final appeal and preserving its independence, the Commission may actually vote up to three times on a single case. When a licensee requests a formal hearing, the entire Commission, which made the initial determination of fault, will vote again on a final decision.

When a licensee chooses an informal hearing to appeal a penalty, the Commission makes the initial, intermediate, and final decisions. To illustrate, two Commission members who have already voted on the case will vote a second time in an informal hearing, and will vote a third time when the full Commission makes the final decision. In these cases, licensees are at a disadvantage by having the same people hear the case three times.

Involvement of Commission members in the initial decision on all cases increases the risk of bias when they consider the decision on appeal. Agency staff could not provide statistics, but could recall only one case out of 30 in which the informal conference decision overturned the initial finding of a violation, and could not recall any case in which the final Commission decision overturned the informal conference decision. While this does not indicate that the wrong decisions were made, it does cause at least the appearance of an unfair process.

**Comparison: Other Texas licensing agencies have formal rules that outline a fairer complaint process, and allow staff to administratively dismiss baseless cases.**

- In contrast to the Funeral Service Commission, most licensing agency board members do not make an initial decision about cases, but become involved only to approve a final agreement after an informal or formal hearing. For example, the Board of Nurse Examiners staff may dismiss complaints if the investigation team determines that probable cause of a violation does not exist. Alternatively, the investigation team may determine that the case should be resolved by an informal or formal settlement.

Informal conferences are conducted by the Executive Director, and the Board’s legal counsel or assistant attorney general must participate. The assigned investigator also attends. If the licensee agrees with the informal conference panel’s recommendation, the Board votes to ratify, modify, or reject the recommendation.

If an agreement cannot be reached in the informal hearing, the Board files formal charges and an administrative law judge (ALJ) of the

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Involvement of Commission members in the initial decision on all cases increases the risk of bias when they consider the decision on appeal.

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In contrast to the Funeral Service Commission, most licensing agency board members do not make an initial decision about cases.

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State Office of Administrative Hearings hears the case. The Board then votes on the ALJ's proposal for decision.

- In other agencies, such as the Board of Veterinary Medical Examiners, the Optometry Board, and the State Board of Public Accountancy, a board subcommittee or the board chair may hold informal hearings, but the full board approves the final decision. In addition, these agencies allow both parties to attend the informal conference, so they may present information to the subcommittee and respond to the subcommittee's questions.
- Most agencies allow staff to administratively dismiss cases if the investigation shows no violation occurred. These include the Board of Nurse Examiners, the Board of Veterinary Medical Examiners, the State Board of Public Accountancy, and the Department of Licensing and Regulation.

#### **4.1 Require the Commission to adopt rules that**

## **Recommendation**

### **Change in Statute**

**comprehensively outline a complaint process.**

#### **4.2 Remove the provision authorizing Commission member participation in informal hearings.**

In developing these rules, the Commission should use the Board of Nurse Examiners' process as a guide. Under this recommendation, the rules must include procedures defining the receipt, investigation, and disposition of complaints; informal hearings; and formal hearings. The process adopted should allow staff to administratively dismiss cases, enable complainants and licensees to fully participate, and ensure that Commission members do not make initial decisions. Adopting these procedures in rule would provide the public with an opportunity to provide input into the process. The public nature of the rules would also aid consumer and licensee awareness of the process, in contrast to the procedures manual designed to guide agency employees.

Commission staff would have the ability to dismiss cases if the investigation shows no violation occurred. Commission members should feel secure in relying on staff expertise and experience to determine when cases should be dismissed. Checks and balances, such as Director of Enforcement and Executive Director review, would ensure that the agency does not dismiss cases deserving further action. In almost all cases, the Commission has voted to dismiss cases in accordance with the staff recommendation. Staff should continue to prepare case summaries, and the Commission could also request to review case files and discuss them at a meeting. Finally, the person who filed the complaint could request

reconsideration by the agency.

After a staff determination that a violation occurred, staff would notify the licensee, who could agree with the sanction, and the Commission would sign the sanction. If the licensee does not agree, he or she could request an informal hearing. Like the Board of Nurse Examiners, the Commission's informal hearings would include the Executive Director, the Director of Enforcement, an investigator who worked on the case, and an attorney. Both the complainant and licensee could also attend. To avoid the appearance of bias, Commission members would no longer be allowed to participate. If the licensee agrees with the informal conference panel's recommendation, the Commission would vote to ratify, modify, or reject the recommendation. This procedure would enable complainants and licensees to fully present their cases to the agency, rather than trying to speak for two minutes within the existing confines of Commission public meetings.

If an agreement cannot be reached in the informal hearing, the Commission would file formal charges and an administrative law judge (ALJ) of the State Office of Administrative Hearings would hear the case. Finally, the Commission would vote on the ALJ's proposal for decision.

## **Impact**

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The intent of this recommendation is to provide a fair process with appropriate avenues for appeal, meaningful opportunities for complainant and licensee participation, and the ability to administratively dismiss baseless cases. The recommendation would enable people to more effectively participate in the agency's complaint process and decisionmaking. In addition, the ability to administratively dismiss cases would free up agency resources, and provide complainants and licensees with quicker resolution.

## **Fiscal Implication**

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These changes would not have a fiscal impact to the State. However, staff would be able to focus on complaints needing the most immediate attention. The Commission would also save time by not having to vote on every case, instead serving only as a final decisionmaker.

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<sup>1</sup> Sunset survey of funeral industry professionals, complainants, and other parties who have been involved with the Texas Funeral Service Commission, August-October 2000.

<sup>2</sup> Ibid.



## Issue 5

### The Commission Does Not Have Appropriate Guidelines in Place for Imposing Fines and Sanctions.

#### Summary

##### Key Recommendations

- Amend the Commission's administrative penalty provisions to require the consideration of standard factors, such as the seriousness of the violation and the threat to the public's health or safety, in setting the amount of a fine.
- Require the Commission to adopt, by rule, guidelines for more consistently linking violations with the appropriate sanction or fine.
- The agency should annually report to the Commission a summary of all violations confirmed, and the sanctions imposed to address these violations.

##### Key Findings

- The agency's statute does not provide many standard safeguards regarding the effective use of sanctions.
- The Commission's rules provide little useful guidance for appropriately and consistently applying fines.
- The Commission does not keep clear records for tracking or evaluating its application of sanctions by category of violation.
- Without clearer guidelines and records, the Commission may be open to potential litigation over arbitrarily and inconsistently assessed sanctions and fines.
- The Commission's practice of assessing a fine for every violation is unusual, and in many cases an inappropriate and ineffective approach to ensuring compliance.

##### Conclusion

The Commission has no clear means of objectively and consistently sanctioning statutory violations. In addition, despite having clear authority to use a wide range of sanctions, the Commission sanctions all violations with fines. Sunset staff examined the penalties in comparison to other Texas licensing agencies. Staff concluded that the Commission would benefit from clearer guidelines, both in law and in rules, to ensure a more effective use of fines and sanctions.

## Support

**Current Situation:** The Commission has general authority to sanction licensees who violate Commission laws or rules.

- The Commission’s statute provides for sanctions including issuing a reprimand, letters of warning, and assessing administrative penalties (or fines), or any combination of the above, without first having to hold a hearing.<sup>1</sup> The statute authorizes a range of fines from \$100 to \$5,000 per violation.
- The Commission’s rules list fines for each violation. However, the range of each fine often covers the same several thousand dollar range allowed by law. The rules also list ten factors (such as the severity and number of repetitions of the offense, number of previous complaints, and the length of time a licensee has practiced) to be considered when imposing sanctions other than fines. However, the Commission’s rules do not list factors to be considered when only imposing fines.
- The Commission assesses a fine for every violation of the code. In fiscal year 2000, the Commission assessed \$156,250 in fines for 42 confirmed violations.<sup>2</sup> The fines ranged from \$250 to \$15,000 per licensee; the average fine per licensee was \$3,720. In addition to fines, criminal cases were filed in two cases, two licenses were suspended, and the Commission requested injunctive relief from the Attorney General’s office in two cases.

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In fiscal year 2000, the Commission assessed \$156,250 in fines for 42 confirmed violations.

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**Problem:** The agency’s statute does not provide many standard safeguards regarding the effective use of sanctions.

- The Commission’s statute authorizes the use of administrative penalties for violations of Commission related laws or rules, and includes standard provisions ensuring the right to a hearing and judicial appeal, if requested. The law also provides for an automatic six-month license suspension for anyone who fails to pay the fine in a timely fashion.

**Standard Factors to Consider When Assessing Administrative Penalties**

- The seriousness of the violation, including the nature, circumstances, extent, and gravity of the violation.
- The threat to health or safety caused by the violation.
- The history of previous violations.
- The amount necessary to deter a future violation.
- Whether the violator demonstrated good faith, including, when applicable, whether the violator made good faith efforts to correct the violation.
- Any other matter that justice may require.

- Sunset staff compared this language with standard provisions in other state agency laws authorizing the use of administrative penalties. The key provision missing from the Commission’s law is one defining the basis for a fine. These factors are detailed in the textbox, *Standard Factors to Consider When Assessing Administrative Penalties*. In addition, while also required by general law, other statutes reviewed included a specific provision stating that, “all penalties

collected under this section of law must be deposited in the state treasury in the general revenue fund,” which is not in the Commission’s statute.

**Problem:** The Commission’s rules provide little useful guidance for appropriately and consistently applying fines.

- The Commission has no formal system or matrix to guide the setting of sanctions, and allows the Executive Director to set the fines for each violation. While in practice, the Executive Director may use some of the criteria listed above for assessing fines, without a formal process, the agency has no system to guarantee that key factors are consistently evaluated in every case.
- The statute requires that the Commission, when determining the amount of a fine, use guidelines established in rule. However, because the rules merely list each code section violation and a fine range, and because the Commission’s rules do not list standard factors to be considered when issuing fines, the Commission has no means to ensure that fines are applied consistently.
- As seen in the textbox, *Selected Violations and Applicable Fines*, for most violations the rules simply repeat the same broad range allowed by law of several hundred dollars up to \$5,000.<sup>3</sup> In addition, very different violations often carry the exact same range of fines. For example, making false statements on a death certificate carries the same range of penalties as using indecent language in front of a decedent’s family. By not having clearer guidelines for the assessment of fines, the Commission risks unjustified variations in disciplinary actions.

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The Commission  
allows the Executive  
Director to set fines  
with minimal  
guidance.

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<b>Selected Violations and Applicable Fines</b>	
<b>Violation</b>	<b>Fine Amount</b>
Falsifying work done as an apprentice.	\$100 - \$2,000
Operating a funeral home in a manner found to be offensive to community moral standards.	\$100 - \$5,000
Refusing to surrender a body to the person legally responsible.	\$250 - \$5,000
Conduct contradictory to moral standards.	\$250 - \$5,000
Impersonation of a licensed funeral director or embalmer.	\$500 - \$2,000
Performing acts outside of scope of license.	\$500 - \$5,000
Misleading advertising.	\$500 - \$5,000
Making false statements on death certificates.	\$500 - \$5,000
Using indecent language in front of a decedent’s family.	\$500 - \$5,000
Employing someone to solicit business from people, by whose influence, bodies may be turned over to the funeral home.	\$1,000 - \$5,000
Practicing fraud when passing examinations.	\$1,000 - \$5,000



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The agency was unable to provide detail on sanctions applied by category of violation.

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**Problem: The Commission does not keep clear records for tracking or evaluating its application of sanctions by category of violation.**

- Commission staff do not have a means of electronically collecting information on the nature of each case and violation. Information is stored in hard-copy files, making it cumbersome and difficult to retrieve information. Commission staff use a spreadsheet to list case numbers, names of parties involved, disposition of the case, and recently added a new column to show nature of complaint, but the spreadsheet does not show the nature of the violation, and it is not searchable.

The staff cannot query a database to find precedent on the kinds of penalties applied to a particular category of violation, thus Sunset staff could not summarize the kinds of sanctions applied to categories of violations. As a result, without manually pulling files, the agency has no way to link sanctions with a particular violation, no way to track the appropriateness or consistency of how sanctions are applied, and no way to check precedents set by previous cases.

**Problem: Without clearer guidelines and records, the Commission may be open to potential litigation over arbitrarily and inconsistently assessed sanctions and fines.**

- State Auditor’s Office audits in 1998 and 1999 identified the lack of a process in place to ensure the progression of sanctions, and recommended that the history of violations be reviewed prior to assessing fines, but a process has yet to be established.<sup>4</sup> Thus, some licensees may argue that fines are arbitrarily, inconsistently, or unfairly applied. One case might result in a heavy fine while a similar case has a lesser fine assessed.

Responses to a Sunset staff survey indicated a perception among some members of the industry that fines are, “too strict on minor infractions and too lenient on major problems” and, “that they are not consistent ... and sometimes it appears that the fine is based on who the firm or individual is rather than on the severity of the behavior.” For a summary of funeral industry responses to questions regarding the Commission’s application of penalties and fines, see *Appendix A*.

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A review of case files found some wide variations in sanctions for similar violations.

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In addition, a review of case files found some wide variations in sanctions for similar violations. For example, two separate licensees had committed the same violation of not displaying the minimum casket merchandise. One was fined \$500 and the other was fined \$2,500. While the actual fines in each case may have been appropriate, Sunset staff could not ascertain the reason for such variations. Without a matrix or documentation to explain the variations, the Commission could be open to allegations of inconsistency in its application of fines.

- The Commission has also taken other steps that could subject the agency to potential lawsuits. Recently the Commission began sending “letters of concern” to some licensees in response to complaints even when no violation was found. While intended to send a message that the Commission was concerned about all complaints, even those that were baseless, the industry saw it as unfair given that the allegations were unsubstantiated. Backlash from the industry caused the Commission to reconsider these letters and their use has been discontinued.

**Problem: The Commission’s practice of assessing a fine for every violation is unusual, and in many cases an inappropriate and ineffective approach to ensuring compliance.**

- The Commission’s statute clearly authorizes use of a wide range of sanctions other than fines, including issuing a reprimand, or suspension or revocation of a license. However, the Commission uses fines as its primary sanction, by attaching them to every violation. Responses to the Sunset survey indicated that some licensees believe fines are not being applied in a way that would effectively deter fraudulent behavior. Instead, they indicated a concern that fines are being increasingly levied to generate revenue for possible use by the Commission.<sup>5</sup>
- For most regulatory agencies, administrative penalties or fines are only one of a broad range of sanctions available to ensure compliance with an agency’s laws and rules. Sunset staff found no other state agencies that assess fines for all violations they confirm. While fines provide an extremely useful means of sanctioning certain behaviors, they are not appropriate in all cases.

For example, most agencies provide reprimands or warnings for lesser, first-time offenses. In some cases, the licensee may not have been aware of the rule, and education, rather than a fine, would be a better approach to achieving ongoing compliance. In other instances, a licensee’s willingness to provide restitution or a refund to a complainant, rather than paying the State a fine, is a better resolution to a case.

- Because the Commission does not regularly use other types of sanctions at its disposal as an alternative to fines, it is not taking advantage of a number of appropriate sanctions, such as provisions to educate professionals for violations made out of an unawareness of rules and regulations rather than willful intent. A funeral director who contacted Sunset staff indicated that he was threatened with fines and penalties for not surrendering a body to a family member when requested. He claimed that it was his understanding that

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Unlike other licensing agencies, the Commission assesses fines for all confirmed violations.

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another family member was legally responsible for the body and he could not violate the statute by surrendering the body to the wrong family member.

**Comparison: Many other Texas agencies use a matrix to guide the application of penalties, and also use a wider range of sanctions beyond fines.**

- Most regulatory agencies adopt rules that further define a procedure for the reasonable application of fines, with input from the industry to ensure effective compliance. In addition to using a wider range of sanctions, other agencies establish matrices for determining the level of a violation and when to apply a particular sanction.

For example, the Texas Department of Licensing and Regulation (TDLR) has established a matrix to be used when assessing penalties against respondents to consumer complaints on air-conditioning businesses. The matrix clearly lists types of violations along with the recommended language to be used in a letter of reprimand; the fine amounts to be applied to first, second, and third offenses; and other recommended actions such as license revocation or suspension. Also, the Office of Consumer Credit Commissioner (OCCC) has recently adopted a rule outlining use of a matrix for applying penalties to some of its licensees.

- Other Texas state agencies have flexibility in ensuring that sanctions are both punitive and yet conform to the seriousness of the offense. For example, the Texas Commission on Judicial Conduct may require a judge to submit to an order of additional education if his violation is found to have been the result of insufficient knowledge rather than a flagrant statutory violation.

## Recommendation

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### Change in Statute

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- 5.1 Amend the Commission's administrative penalty provisions to require the consideration of standard factors, such as the seriousness of the violation and the threat to the public's health or safety, in setting the amount of a fine.**

The Commission's enabling law should clearly specify each of the standards outlined previously in this issue, including: seriousness of the violation, threat to health and safety, history of prior violations, amount necessary to deter future offenses, and any good faith efforts to correct the violation. This would ensure that each of these common sense factors is taken into account to make the use of fines effective. These factors also help ensure that fines are used in a constructive, judicious manner to effect

compliance, not simply as a punitive measure. As part of this recommendation, the law should also be amended to clearly state that all fines collected are deposited into the General Revenue Fund.

### **5.2 Require the Commission to adopt, by rule, guidelines for more consistently linking violations with the appropriate sanction or fine.**

This recommendation would help to ensure the appropriate application of sanctions to each violation. To do this, the Commission would need to clearly define and summarize the most common violations. The Commission should then establish a matrix of the violations along with a list of elements to grade each violation before applying a sanction. For example, a first time offense of a less serious nature, such as using inappropriate language in front of a decedent's family, would generally not receive an automatic fine. A more appropriate sanction would perhaps be a reprimand ordering additional education.

This recommendation would allow for deviations from the matrix but the Commission should clearly establish reasons for, and explain deviations from the matrix. Establishing the matrix in rules ensures consumer and industry input. Before developing proposed rules, the Commission should consider using focus groups to obtain industry and consumer input to structure an effective match of sanctions to violations. The matrix should also be posted on the Commission's Web site.

## **Management Action**

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### **5.3 The agency should annually report to the Commission a summary of all violations confirmed and the sanctions imposed to address these violations.**

An annual summary would help ensure that licensees were aware of what constitutes a violation and the resulting sanctions. As part of this recommendation the Commission should include a summary of violations in its biennial strategic plan to the Legislature, and place it on the agency's Web site. Making the information available to consumers on the Web site would help to ensure consumer confidence by showing that the Commission sanctions its licensees appropriately.

## **Impact**

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This recommendation would help to ensure that the application of fines is not perceived as arbitrary or inappropriate, and help to ensure that offenses are consistently penalized. Ensuring the use of a broader range of options for sanctioning licensees may also help to alleviate the licensees' perceptions that they are being excessively fined for less serious offenses. Using all sanction options available to the Commission may help to ensure more rehabilitation for violations made out of ignorance and deter future improper conduct. In addition, having a penalty matrix in place would protect the Commission from misperceptions by giving the agency a reference point when penalties and fines are called into question.

## **Fiscal Implication**

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This recommendation would have no fiscal impact to the State. Fines assessed under the proposed system could vary from current levels but this could not be determined for this report.

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<sup>1</sup> The Commission is authorized to issue reprimands without a hearing if the licensee waives the right to a hearing. Texas Government Code, ch. 551, sec. 651.504.

<sup>2</sup> A complete breakdown illustrating the categories of the violations was not available. Commission staff stated that this information could be obtained only after pulling the files on each case and manually sorting each file into categories of violations. Since assessment, some of these fines have been reduced as a result of informal hearings.

<sup>3</sup> Vernon's Texas Civil Statutes, art. 4582b, sec. 3(H).

<sup>4</sup> Office of the State Auditor, *An Audit of Management Controls at the Funeral Service Commission*, April 1999, p. 1.

<sup>5</sup> Sunset survey of funeral industry professionals, complainants, and other parties who have been involved with the Texas Funeral Service Commission, August-October 2000.

## Issue 6

### Not Regulating the Burial and Final Disposition of a Body Fails to Adequately Protect Consumers from False or Deceptive Practices.

#### Summary

##### Key Recommendations

- Require the registration of owners or operators of cemeteries and crematories with the Funeral Service Commission to ensure responsibility for the complete disposition of a body.
- Require cemeteries and crematories to disclose information to consumers.
- Authorize the Commission to enforce violations of unprofessional conduct by owners or operators of cemeteries and crematories, as defined by Commission rules.
- Authorize the Commission to set, in rule, reasonable fees to cover the costs of registration of cemeteries and crematories.
- Ensure that funeral directors are responsible for services and goods they subcontract or arrange for as part of a package funeral, including cemetery and crematory services.

##### Key Findings

- Many cemeteries fail to provide consumers with accurate information on prices, refunds, financing, or the legal requirements regarding the purchase of cemetery products.
- Many consumers are unaware that funeral directors are not accountable for these services, even when the funeral director subcontracts for the cemetery or crematory services.
- The Commission receives complaints regarding cemeteries and crematories, but cannot investigate them because it lacks jurisdiction.

##### Conclusion

The Commission does not have the authority to rectify consumer complaints regarding certain aspects of a burial or cremation. As a result, consumers are confused about who is professionally responsible for these key parts of a funeral. Sunset staff found that cemeteries have the same potential consumer complaint issues as funeral homes, and thus recommend expanding the State's regulatory authority to cover these services, whether contracted for directly, or through a funeral director.

**Current Situation:** The Commission regulates funeral directors and embalmers, but not the burial or final disposition of a body by the cemetery or crematory.

- Texas law governing the regulation of funeral directors and embalmers defines funeral directing as all acts associated with or arranging for the disposition of a body. Providers of other funeral services, such as cemetery and crematory services, also arrange for the disposition of a body, but are not regulated. For an explanation of these providers, please see the textbox, *Funeral Industry Service Providers*.

Funeral Industry Service Providers			
Provider	Definition	Regulated	Number in Texas
Funeral Director	Responsible for arranging for the disposition of a body.	Yes	3,320*
Embalmer	Temporarily preserves a body using chemicals, as described in statute.	Yes	3,320*
Owners or Operators of Cemeteries	Responsible for final interment of bodies in graveyards, burial parks or mausoleums; and ensuring that bodies are properly buried as requested by consumers.	No	About 7,000 cemeteries <sup>1</sup>
Owners or Operators of Crematories	Person who uses a structure containing a furnace, to reduce a body to ashes using intense heat.	No	About 50 crematories

\*This number represents the total number of funeral directors and embalmers. Separate figures were not available.

- Cemeteries can be owned and operated by private corporations or nonprofit associations. According to Save Texas Cemeteries, Inc., the number of active cemeteries currently open for public use in Texas is approximately 7,000.<sup>1</sup>

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An estimated 7,000 cemeteries and 51 crematories are operating in Texas.

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Crematories are required by Texas law to be located in a cemetery. As of 1998, 51 crematories were operating in Texas.<sup>2</sup> The owner of a crematory may or may not be the same person as the owner of the cemetery. For example, a crematory operating in Burnet leases land from the local city cemetery.<sup>3</sup>

- Currently, the only aspect of cemetery services directly regulated by the State is the sale of perpetual care cemetery contracts. Perpetual care cemeteries ensure continued maintenance of a plot through the investment of a trust fund that provides continuous income for the cemetery to provide the service. The Department of Banking reviews these contracts to ensure that consumers' funds are prudently handled and invested. All perpetual care cemeteries are licensed and examined

on-site on an annual basis. Currently, 227 perpetual care cemeteries operate in Texas, with \$157 million in assets.

- Cemeteries and crematories must also abide by certain requirements in state law, such as those governing the location of the cemetery and the depth of graves. Criminal codes also restrict the cremation of unidentified bodies or bodies held for inquests,<sup>4</sup> and natural resource codes control crematory emissions for air quality purposes.<sup>5</sup>

**Problem: Many cemeteries fail to provide consumers with accurate information on prices, refunds, financing, or the legal requirements regarding the purchase of cemetery products.**

- Many opportunities exist for providers of cemetery and crematory services to take advantage of a consumer. In 1999, the American Association of Retired Persons (AARP) conducted two studies on funeral planning and cemetery sales practices and found many cemeteries engaging in questionable business practices.

Consumers called and visited cemetery providers and found many failing to provide written price information to shoppers, failing to provide essential details about financing, and providing deceptive information about legal requirements for purchasing certain cemetery products. For a summary of some key findings, see the textbox, *AARP Studies of Funeral Planning and Cemetery Sales Practices*.<sup>6</sup>

**Problem: Many consumers are unaware that funeral directors are not accountable for cemetery or crematory services, even when the funeral director subcontracts for these services.**

- Consumers may contract directly with a cemetery or crematory, or rely on a funeral director to subcontract for cemetery or crematory arrangements. However, a funeral director's professional responsibility ends when interment or entombment services are complete; or the body is released for transport to a crematorium. Under current state law, even when the funeral director subcontracts for cemetery and crematory services as part of a full funeral package, the funeral director is not liable for any wrongdoing or inappropriate behavior on behalf of these subcontractors.
- In recent years, the funeral industry has become so integrated that often, a funeral director will own both a funeral home and a cemetery. However, while consumers' purchases of a funeral director's services are protected by state law, the law offers no consumer protection for either direct or indirect purchases of cemetery and crematory services. This means that no state entity is responsible for ensuring that a burial is made in an agreed to location, or that a coffin is handled in

#### **AARP Studies of Funeral Planning and Cemetery Sales Practices**

When AARP sent mystery shoppers out to call or visit cemeteries, they found that:

- two-thirds were not shown a written price list,
- more than 60 percent were told over the phone that the establishment would not mail a price list for comparison shopping purposes,
- 85 percent of cemetery salespersons failed to disclose the terms of financing plans or cancellation/refund policies,
- 13 percent were incorrectly told that the purchase of a grave liner was required by state law, and
- 29 percent were told that a grave liner would preserve a body indefinitely.



an appropriate manner once the funeral director has turned over responsibility.

**Problem: The Commission receives complaints regarding cemeteries and crematories, but cannot investigate them because it lacks jurisdiction.**

- According to Commission staff, the lack of regulation of the final interment or cremation of a body has resulted in complaints, particularly regarding the mishandling of remains after the funeral director leaves a grave side and the cemeterian begins the actual burial, or a crematory begins disposition of a body.

For example, one such complaint involved a casket that was destroyed by the gravedigger—an oversized casket was forced into a too small mausoleum space. In another case, a family complained of having been given the wrong ashes. However, the Commission could find no fault with the funeral director in either case because the funeral director’s responsibility had officially ended.<sup>7</sup>

- The Commission has no record of the exact number of such complaints it has received. Because these complaints fall outside the Commission’s statutory jurisdiction, it does not generally accept or investigate them.
- The Office of the Attorney General’s (OAG) Consumer Protection Division attempts to mediate certain complaints about cemeteries under the Deceptive Trade Practices Act, but OAG has limited resources to respond to individual complaints. The only other alternative an aggrieved consumer has is to file a suit in civil court.
- A Sunset staff survey found that consumers did not understand why the Commission could not address their complaints concerning cemetery and crematory services, and felt that complaints such as the handling of a casket after it has been turned over to a cemeterian for interment should be rectified by the Commission. In addition, most industry professionals and consumers indicated a need to regulate all funeral related service providers, including cemetery and crematory providers. For a summary of responses to the Sunset survey, see *Appendix A*.

**Comparison: Other states regulate cemetery and crematory services to ensure consumer protection.**

- According to a survey by the International Cemetery and Funeral Association, approximately 70 percent of states have laws requiring permitting or regulation of cemeteries.<sup>8</sup> Some states, like Indiana, require licensing of cemeteries which includes continuing education requirements. Some states, like Washington, require only that cemeteries and crematories have permits authorizing their operation.

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Approximately 70 percent of states have laws requiring permitting or regulation of cemeteries.

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For examples, see the chart, *Other States' Regulation of Funerals, Cemeteries and Crematories*.

<b>Other States' Regulation of Funerals, Cemeteries and Crematories<sup>9</sup></b>		
<b>State</b>	<b>Agency</b>	<b>What is Included?*</b>
California	Cemetery and Funeral Bureau, Department of Consumer Affairs	Funeral directors, embalmers, funeral homes, cemeteries, crematories, and cremated remains disposers
Florida	Board of Funeral Directors and Embalmers, Division of Professions, Department of Business and Professional Regulation	Funeral directors, embalmers, removal services, and direct disposers
Georgia	Board of Funeral Services, Secretary of State	Funeral directors, embalmers, funeral homes, and crematories
Indiana	State Board of Funeral and Cemetery Service, Professional Licensing Agency	Funeral directors, embalmers, funeral homes, and cemeteries
Maryland	State Board of Morticians, Department of Health and Mental Hygiene	Funeral directors and embalmers
	Office of Cemetery Oversight, Division of Occupational and Professional Licensing, Department of Labor	Cemeteries
New York	Bureau of Funeral Directing, Department of Health	Funeral directors and embalmers
	Division of Cemeteries, Business and Licensing Services, Department of State	Cemeteries, public mausoleums, lawn crypts, crematories, rights of lot owners, and burial rights
Pennsylvania	State Board of Funeral Directors, Professional and Occupational Affairs Bureau, Department of State	Funeral directors and funeral homes
	Real Estate Commission, Profess- ional and Occupational Affairs Bureau, Department of State	Cemeteries, cemetery brokers, and cemetery salespersons
Virginia	Board of Funeral Directors and Embalmers, Department of Health	Funeral directors, embalmers, and funeral homes
	Cemetery Board, Department of Professional and Occupational Regulation	Cemetery operators
Washington	Funeral and Cemetery Licensing Program, Business and Professions Division, Department of Licensing	Funeral directors, embalmers, funeral homes, crematories, private cemeteries

\*Terms used are those used by the individual states.

- The Federal Trade Commission’s funeral regulations currently cover only funeral directors and embalmers. However, the U.S. Senate Committee on Aging held hearings earlier this year to consider expanding the Federal Trade Commission’s (FTC) “Funeral Rule” to include cemeteries and crematories. The Funeral Rule is designed to protect consumers from unscrupulous business practices by requiring, among other things, that funeral service providers disclose price information and not make false claims about what purchases and services are required. FTC announced in May 2000 that it would propose new rules to cover these service providers but has not yet done so.<sup>10</sup> More complete information on the Funeral Rule can be found in the Agency Information section of this report.

## Recommendation

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### Change in Statute

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#### **6.1 Require the registration of owners or operators of cemeteries and crematories with the Funeral Service Commission to ensure responsibility for the complete disposition of a body.**

This recommendation would require cemetery and crematory owners or operators to register for a permit to operate such a business in Texas, and would give the Commission the authority to rectify consumer complaints directed at these providers. This would help to ensure accountability for professional behavior in all establishments providing interment or body disposition services, from the beginning of funeral arrangements until the burial or cremation is complete. Owners or operators of cemetery and crematory services would be responsible for ensuring that professional standards of conduct, as defined by the Commission in rule, would be followed within their businesses.

This recommendation would authorize the Commission to investigate and sanction these owners or operators when consumers file complaints about services provided by them. Cemetery and crematory inspections would occur only when complaints arise, and facilities would not be subject to a regular inspection process. This recommendation would not subject cemetery owners to regulation of their operations by the Commission beyond the actual burial or other final disposition of a body.

For purposes of this recommendation, registration would consist of an application outlining the purpose of the business, location of the business, and indicate the individual, either the owner or the operator, to be held liable for business practices. If the crematory and the cemetery have separate owners, the cemetery and crematory owners would register independently.

Cemetery owners who are currently registered with the Department of Banking as “perpetual care cemeteries” would still be subject to the professional accountability recommended in this issue, however they would be exempt from having to register with, and pay a second fee to, the Commission. The Memorandum of Understanding that currently exists between the Commission and Department of Banking should be expanded to include a reciprocity agreement, requiring Department of Banking to annually send a list of perpetual care licensees to the Commission.

Cemeteries covered in statute would include all cemetery organizations as defined in § 711.001 of the Health and Safety Code, and would exclude the majority of cemeteries considered to be historical or family-owned.<sup>11</sup>

### **6.2 Require cemeteries and crematories to disclose information to consumers.**

This recommendation would require that the same disclosure requirements that currently apply to funeral homes should be extended to cemeteries and crematories. Cemetery and crematory providers should give consumers written price lists, information on financing policies, information on operations policies, information on who to turn to should they wish to complain of unprofessional business practices, and other information required by Commission rules. This would help to ensure that consumers are aware of their options and of the establishment’s professional responsibility.

### **6.3 Authorize the Commission to enforce violations of unprofessional conduct by owners or operators of cemeteries and crematories, as defined by Commission rules.**

This recommendation would authorize the Commission to impose a range of penalties, including issuing a reprimand; assessing administrative penalties; or revoking or suspending an entity’s authority to operate a cemetery or crematory, for violations of the statute. These sanctions should be structured similarly to the Commission’s current sanctions for funeral establishments.

### **6.4 Authorize the Commission to set, in rule, reasonable fees to cover the costs of registration of cemeteries and crematories.**

This recommendation would allow the Commission to determine and establish a single cost-recovery fee for administering the registration of owners of cemeteries and crematories. The recommendation would also allow the Commission to incorporate into fees, estimated costs for the investigation of complaints.

### **6.5 Ensure that funeral directors are responsible for services and goods they subcontract or arrange for as part of a package funeral, including cemetery and crematory services.**

This would ensure that funeral directors who subcontract for cemetery and crematory services are held accountable for the entire disposition of the body. Clearly defining in statute that a funeral director’s responsibility ends when the body is interred, rather than ending when the services are complete, would help ensure accountability for subcontracted services.

## Impact

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Expanding regulation would better serve consumers by ensuring professional liability up until the final disposition of a body is complete, including filling a grave, sealing a mausoleum, or packaging cremated ashes. The State would have authority to penalize or reprimand all cases where improper professional behavior had occurred during final disposition. Funeral directors who agree to arrange every aspect of a burial, including final interment, would be held accountable for all actions of the individuals with whom they subcontract. Should a consumer choose to use a funeral director for portions of the funeral but directly contract for cemetery and crematory services, the person providing the cemetery or crematory services would be held accountable, not the funeral director.

These recommendations would not affect the regulation of cemeteries currently conducted by the Department of Banking. The Department would continue to regulate the sale of perpetual care cemetery contracts and address all consumer concerns regarding those contracts.

## Fiscal Implication

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These recommendations should have no net impact on the General Revenue Fund because the costs of the regulation would be covered by permitting fees. The Commission would set permitting fees, by rule, at a level to recover the cost of regulation.

Based on current salary information on two additional licensing technicians as provided by the Commission, and an estimate of 7,000 active cemeteries and 50 crematories in Texas, Sunset staff estimates the annual costs of regulation at \$53,448. These costs could be covered by a combined permit and inspection fee of \$7.65 per license.

<b>Fiscal Year</b>	<b>Cost to the General Revenue</b>	<b>Revenue Generated by New Fees</b>	<b>Change in FTEs from FY 2001</b>
2002	\$53,448	\$53,448	+2
2003	\$53,448	\$53,448	+2
2004	\$53,448	\$53,448	+2
2005	\$53,448	\$53,448	+2
2006	\$53,448	\$53,448	+2

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- <sup>1</sup> Save Texas Cemeteries, Inc. (STC), a nonprofit corporation organized in November 1994 as a statewide, educational organization, is currently gathering data on Texas burial sites. STC has created a database known as the Cemetery Burial Site Location Data Collection Form and is collecting information on Texas cemeteries. The database currently has information on 37,000 cemeteries but STC estimates that there are approximately 7,000 that are active in selling or giving away services. Interview with staff of Save Texas Cemeteries, Inc., Austin, Texas, October 28, 2000; and letter from Karen R. Thompson, Save Texas Cemeteries, Inc., November 1, 2000 (fax).
- <sup>2</sup> Carlson, Lisa, *Caring for the Dead: Your Final Act of Love* (Hinesburg, Vt.: Upper Access Books, 1998), p. 539.
- <sup>3</sup> Phone interview with staff of Clements-Wilcox Crematory (Burnet, Texas, October 24, 2000).
- <sup>4</sup> Texas Code of Criminal Procedure, ch. 49, art. 49.09.
- <sup>5</sup> Telephone conversations with staff of the Natural Resource Conservation Commission, October 2000.
- <sup>6</sup> *Cemetery Mystery Shop Study*, A Study Conducted by FGI, Report Prepared by AARP Research Group, August 1999.
- <sup>7</sup> Conversations with Texas Funeral Service Commission staff, September and October 2000.
- <sup>8</sup> *Survey of State Cemetery, Mortuary, and Crematory Laws and Regulation*, International Cemetery and Funeral Association, (Reston, VA, 1998).
- <sup>9</sup> Information obtained from state government Web sites, September 2000.
- <sup>10</sup> AARP Bulletin, *The Trouble With Funerals*, September 2000, Volume 41, No. 8.
- <sup>11</sup> The Health and Safety Code defines cemetery organizations as either nonprofit, unincorporated associations of plot owners, authorized by articles of association to conduct a cemetery business; or corporations, either profit or nonprofit, authorized by articles of incorporation to conduct a cemetery business; and defines historic cemeteries as those sponsored and maintained by a nonprofit corporation which has a religious, ethnic, historic, or cultural relationship to the cemetery, established more than 75 years ago, and not having any viable organization of plot owners.



# Issue 7

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## The Composition of the Funeral Service Commission Violates Recent Changes to the Constitution.

### Summary

#### Key Recommendation

- Expand the Funeral Service Commission from six to seven members by adding a funeral industry representative.

#### Key Finding

- The composition of the Funeral Service Commission violates the terms of a recently adopted Constitutional amendment.

#### Conclusion

The primary duties of the Funeral Service Commission are to decide on complaints against funeral licensees and to oversee the operation of the agency. In the last session, the Legislature reduced the Commission's size from nine to six members while increasing the number and role of public members. After completion of the legislative session, Texas voters approved a constitutional amendment requiring state agency boards to be composed of an odd number of members. The Sunset review examined the work of the Commission and the impact of the constitutional amendment and concluded that adding an additional industry member would bring the Commission into compliance with the Constitution, while maintaining a majority of public members.



## Support

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**Current Situation:** The Funeral Service Commission is a six-member governing body.

- In 1999 the Legislature restructured the Funeral Service Commission, reducing the size of its membership from nine members to six. At the same time, the Legislature increased the percentage representation of public members from slightly more than half to two-thirds. The Commission's Chair and Vice Chair are also required to be public members.
- The Commission, which is required to meet at least quarterly in Austin, passes rules to enforce the Funeral Directing and Embalming Act, takes action on complaints and sanctions against funeral industry licensees, and hires the Executive Director.

**Problem:** The composition of the Funeral Service Commission violates the terms of a recently adopted Constitutional amendment.

- In 1999, after the Legislature reduced the size of the Commission to six members, Texas voters approved a constitutional amendment that requires state boards and commissions created by the Legislature to have an odd number of members.<sup>1</sup>
- The constitutional amendment does not have a grandfather provision allowing commissions created before the amendment to continue under their current composition. Rather, a temporary provision of the amendment requires the Legislature to recreate nonconforming commissions to meet the new requirements by September 1, 2003.

## Recommendation

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### Change in Statute

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#### **7.1 Expand the Funeral Service Commission from six to seven members by adding a funeral industry representative.**

This recommendation would expand the Funeral Service Commission to seven members. The Commission would be composed of four public members and three funeral industry representatives. Current requirements for the Chair and Vice Chair to be public members would remain in place.

## Impact

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This recommendation would expand the Funeral Service Commission to comply with the terms of the recent constitutional amendment. An increase in the size of the Commission would also provide an additional member to help with its deliberations in deciding on sanctions against licensees and allow the Commission to create and use subcommittees. Adding an additional industry member would preserve the public member majority while increasing the Commission's industry expertise.

## Fiscal Implication

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This recommendation would have a fiscal impact to the State. Expanding the Commission would result in additional travel expenses and per diem for the new member. Based on current projections, costs would increase by about \$900 per year.

<b>Fiscal Year</b>	<b>Cost to the General Revenue Fund</b>
2002	\$900
2003	\$900
2004	\$900
2005	\$900
2006	\$900

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<sup>1</sup> Texas Constitution, article XVI, sec. 1.



**DEPARTMENT OF BANKING:  
OVERSIGHT OF PREPAID FUNERAL CONTRACTS  
AND PERPETUAL CARE CEMETERIES**

## Review of the Department of Banking's Oversight of Prepaid Funeral Contracts and Perpetual Care Cemeteries

### Approach

**Because of questions concerning the overall consolidation of funeral industry regulation, Sunset staff delayed its recommendations on prepaid funeral contract and perpetual care cemetery regulation during the Department of Banking review.**

- During the Department of Banking review, Sunset staff explored the possibility of transferring the Department's regulation of prepaid funeral contracts and perpetual care cemeteries to a single regulator. Staff felt that these types of recommendations might be premature given that the Department's report was released before the conclusion of the Funeral Service Commission review. To better explore the concept of regulatory consolidation, staff elected to consolidate its findings concerning the Department into its report on the Funeral Service Commission.

### Analysis

**Valid arguments exist for and against the Department of Banking's continued regulation of prepaid funeral contracts and perpetual care cemeteries.**

- Staff noted two key arguments against the continuation of prepaid funeral and perpetual care cemetery regulation at the Department of Banking. First, the Department's continued regulation of these industries contributes to the fragmentation of funeral industry regulation. At a time of growing consolidation within the funeral industry, fragmentation precludes a holistic approach to industry regulation.

The second argument against the Department's continued regulation of these industries relates to the handling and processing of consumer complaints. Currently, consumer complaints regarding prepaid funerals and perpetual care cemeteries are processed by the Department and the Funeral Service Commission. This

fragmented handling process confuses consumers with complaints and leads to complaints being bounced between agencies.

- The critical argument for maintaining the Department of Banking's regulation of prepaid funeral contracts and perpetual care cemeteries is that the Department has the needed financial expertise to monitor these segments of the funeral industry. The Department's examiners have the appropriate training for these reviews. Further, the Department has, at times, called upon its regular bank examiners to conduct funeral contract and cemetery examinations.

## Conclusion

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### **Maintain the regulation of prepaid funeral contracts and perpetual care cemeteries at the Department of Banking.**

While consolidating funeral industry regulation offers the advantages of better coordinated regulation and enhanced processing of consumer complaints, Sunset staff found that regulation of prepaid funeral contracts and perpetual care cemeteries was better placed with the Department of Banking at this time. Consolidating regulation, particularly at this juncture, risks the loss of expertise already established at the Department. Moreover, as this report details, the Funeral Service Commission is having difficulty carrying its current mission. Sunset staff could not justify adding these responsibilities to those of the Commission.

Although the regulation of prepaid funeral contracts and perpetual care cemeteries should stay with the Department of Banking, Sunset staff found concerns with other aspects of their regulation that need addressing. These aspects include the Department's authority to enforce the relevant codes and the absence of reasonable consumer protection for buyers of prepaid funeral contracts. These issues are addressed in this section of the report.

## Issue 8

### State Law Lacks Reasonable Consumer Protection for Prepaid Funeral Contracts.

#### Summary

##### Key Recommendations

- Prohibit the use of finance charges on all prepaid funeral contracts.
- Allow consumers to receive the full fair value of their investment upon cancellation of a prepaid funeral contract.
- Require that consumers or their estates receive the full fair value of their investment at time of death.
- Require that prepaid funeral contracts be written in plain language with full disclosure of services that are and are not provided.

##### Key Findings

- Some consumers purchasing prepaid funeral contracts through installment payments are required to pay finance charges.
- Consumers who cancel their prepaid funeral contracts do not receive reasonable refunds.
- Some consumers and their estates do not receive the full value of their money upon time of death.
- The types of prepaid funeral contracts used are not standardized and may confuse consumers regarding anticipated benefits.
- Other states require greater consumer protections for their prepaid funeral contract sales.

##### Conclusion

The current prepaid funeral contract statute does not adequately protect Texas consumers purchasing prepaid funeral contracts. Under the current statute, contract sellers are allowed to assess finance charges, make contracts nontransferable, and take the interest earned off of the consumer's original investment. While many prepaid funeral contract vendors in Texas may be completely fair and reasonable with their customers, the statute allows for unreasonable contracts with the potential to harm consumers and nullify the benefits of prepaid contracts.

The Sunset review identified several areas in the prepaid funeral contract statute that require change to better protect the consumers' interest. Changing the statute to reflect more of the consumers' interest would help make prepaid funeral contracts more reasonable investments for Texans.

## Support

### **Current Situation: Thousands of Texans own prepaid funeral contracts as a way to curb funeral costs.**

- Prepaid funeral contracts are arrangements that consumers make for certain funeral goods and services before they die. As part of the contract, the consumer prepays a funeral home for such goods and services as a casket, embalming, or limousines. Prepaid funeral contracts in Texas do not cover cemetery spaces, tombstones, crypts, or mausoleums.

The principal advantage of the prepaid funeral contract is to lock in rising funeral costs at today's prices. Once a prepaid contract is purchased, the consumer's funds are invested in stocks, bonds, certificates of deposit, and mutual funds to ensure their growth. Once the consumer dies, the prepaid funds are used by the funeral home to provide the designated goods and services. The earnings from the consumers' funds cover any increases in cost for the contracted goods and services.

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In 1999, the number of prepaid funeral contracts in Texas totaled more than 840,000, with a net worth of \$1.9 billion.

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- Two types of funeral contracts are available to consumers, trust-funded and insurance-funded contracts. Trust-funded contracts are where a consumer pays into a trust fund where the money is invested to accrue capital gains and interest. Trust-funded contracts represent the majority of prepaid funeral contracts in Texas.

Insurance-funded contracts are essentially small life insurance policies that the consumer purchases that identify the funeral home as the principal beneficiary upon time of death. In 1999, of the more than 840,000 prepaid funeral contracts in Texas, 510,370 were trust-funded and 332,627 were insurance-funded. The net worth of these contracts was \$1.9 billion.<sup>1</sup>

### **Current Situation: Prepaid funeral contracts are primarily regulated by the Texas Department of Banking.**

- The Department of Banking regulates trust-funded and insurance-funded funeral contracts. All prepaid funeral contract vendors are required to be licensed by the Department, which conducts annual examinations of all licensees to ensure compliance with statute and that consumers' funds are appropriately used. The Department also checks and approves all prepaid contracts to ensure conformance with prescribed guidelines. The Department currently oversees 438 prepaid funeral contract sellers.
- Insurance-funded funeral contracts and vendors are also regulated by the Texas Department of Insurance (TDI). TDI licenses all agents



and companies selling insurance-funded contracts since insurance policies are involved. The Department also reviews the life insurance policies used to ensure compliance with the Texas Insurance Code. In addition, TDI ensures that the insurance companies selling insurance-funded contracts are solvent. TDI does not regulate the rates, or premiums, used with insurance-funded contracts. The textbox, *Insurance-Funded Contracts*, explains how the life insurance policies and funeral contracts work.

**Problem: Some consumers purchasing prepaid funeral contracts through installment payments are required to pay finance charges.**

- Both the Texas Finance Code and Credit Code authorize the payment of finance charges and interest of up to 18 percent for prepaid funeral contracts purchased through installment plans. Unlike typical installment purchase plans, such as those for a television, car, or house, those for prepaid funerals include finance charges before any material good or service has been given to the consumer.
- Allowing contract sellers to charge interest on prepaid funeral contract payments contradicts the original intent of the contracts. Consumers purchase funeral contracts to have their money invested, earn interest, and thereby avoid the sting of rising funeral costs. Permitting the use of finance charges, where consumers pay interest, mitigates the principal advantage of purchasing a prepaid funeral contract. Lastly, the interest that consumers pay does not go towards the funeral benefit that they ultimately receive; the funeral contract sellers get to keep the interest paid. Consequently, consumers with contracts that require finance charges risk paying more in interest than they would normally earn.
- Currently 73, or about 17 percent, of the prepaid funeral contract sellers in Texas assess finance charges.<sup>2</sup>

**Problem: Consumers who cancel their prepaid funeral contracts do not receive reasonable refunds.**

- Texas statute authorizes contract sellers to take 10 percent of the consumer's principal to cover selling expenses, service costs, and general overhead. Consumers who cancel their prepaid funeral contract receive 90 percent of their original payment. In addition, consumers who cancel their contracts are not entitled by law to receive the interest that their funds have earned. That money remains with the contract seller.
- Consumers risk losing thousands of dollars by canceling their prepaid funeral contracts. Take, for example, a prepaid contract that was purchased for \$5,000 in 1990. At six percent interest that amount would be worth \$8,954 ten years later (\$5,000 multiplied by 1.06 compounded over ten years). If the consumer decided to cancel the

**Insurance-Funded Contracts**

Consumers who purchase insurance-funded funeral contracts receive two forms. The first is a funeral contract that lists the expected funeral benefits. The other form is a life insurance policy that identifies the funeral home as the beneficiary. State law requires all life insurance policies that designate the funeral home as beneficiary to be accompanied with a funeral contract.

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Consumers risk losing thousands of dollars by cancelling their prepaid funeral contracts.

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contract in 2000, then the \$3,954 earned in interest would go to the contract seller. In addition, the consumer would lose ten percent, or \$500, of the principal to the seller in the form of overhead expenses and service costs. In the end, the consumer would lose \$4,454 by canceling the prepaid funeral contract, with that money remaining with the contract seller. This is highly unusual for an investment product designed to benefit the consumer.

The consumer's financial loss upon contract cancellation is aggravated by the Internal Revenue Service's taxation of the interest earned. Under federal tax law, Texas consumers can be taxed on money that they cannot retrieve. This is discussed in the textbox, *Of Death and Taxes*.

#### Of Death and Taxes

The IRS requires trust-funded contract holders to declare their interest income on their Income Tax Return. Consequently, funeral contract purchasers are held liable for all interest and capital gains accrued by trust-funded investments. Recently the IRS has begun to allow funeral homes to declare trust fund interest on their tax returns. The IRS provision does not require this, however.

**Problem: Some consumers and their estates do not receive the full value of their money upon time of death.**

- Texas law allows funeral contract sellers to keep the earnings of a given contract after the consumer has died and contracted funeral benefits have been dispersed. Take, for example, the previously mentioned \$5,000 contract purchased in 1990 that grows in ten years to \$8,954. Although the consumer paid \$5,000 in 1990, by 2000 the contracted benefits are worth \$6,000 because of rising funeral costs and inflation. The prepaid funeral contract covers the \$6,000 in funeral costs. State law allows the contract seller to keep the remaining earnings, in this case \$2,954. Although the earnings come from the consumer's original investment and, in some cases, the consumer is taxed by the IRS on those earnings, the earnings do not go to the contract holder's estate. This is highly unusual for most investments.

**Problem: The types of prepaid funeral contracts used are not standardized and may confuse consumers regarding anticipated benefits.**

- The Department of Banking approves the contract forms for all prepaid funeral contracts. Beyond the criteria listed in the Finance and Administrative Codes, the Department does not require that a standard prepaid funeral contract be used. The lack of standardization of prepaid funeral contracts makes it difficult for consumers to compare contract terms among funeral providers.

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State law allows the contract seller to keep the remaining earnings after the consumer has died.

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- Prepaid funeral contracts are not required to be written in plain language, resulting in contracts that are often confusing and hard to read. Consequently, consumers are often unaware of those funeral benefits covered in the contract and those that are not. Many of the complaints received by the Department of Banking and the Funeral Service Commission involve consumers who assumed that everything was covered by the prepaid contract and were upset to have to pay additional expenses at the time of the funeral.

For example, a typical complaint is that while a casket, embalming, and other services are provided, some services, such as grave opening and closing, are not. Although the contract appropriately listed the goods and services to be provided at the time of death, it did not list excluded services, thereby creating confusion.

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Many consumers  
mistakenly assume  
that the contracts  
cover more than they  
actually do.

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**Comparison: Other states require greater consumer protections for their prepaid funeral contract sales.**

- Fourteen states, including Arizona, New York, and Virginia, prohibit finance charges on prepaid funeral contracts.<sup>3</sup>
- Nineteen states, including California, New York, and Illinois, allow consumers to receive a full refund, including earned interest, of their prepaid funeral contracts.<sup>4</sup> These provisions give consumers in those states the flexibility to either cancel or transfer their prepaid contracts. The State of Mississippi allows full refunds if the funeral services are provided at a location more than 50 miles from the place where the original contract was executed.
- Nineteen states require standard provisions for all prepaid funeral contracts.<sup>5</sup> Some states, such as Texas, only require that the contract be in writing, identify the parties involved, and list the benefits provided. Other states require standard disclosures, including the purchaser's right to cancel, the use of plain language, and large font print.<sup>6</sup>

## Recommendation

### Change in Statute

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#### **8.1 Prohibit the use of finance charges on all prepaid funeral contracts.**

This recommendation would remove the provisions in statute allowing for contract sellers to use finance charges and replace them with the simple prohibition of the practice.

**8.2 Allow consumers to receive the full fair value of their investment upon cancellation of a prepaid funeral contract.**

This recommendation would allow consumers to cancel their prepaid funeral contract and receive their original principal and the accrued interest. As part of this recommendation, the contract seller would still be permitted to retain 10 percent of the consumer's original principal as recompense for services rendered.

**8.3 Require that consumers or their estates receive the full fair value of their investment at time of death.**

This recommendation would give consumers and/or their estates the remaining earned interest from their original investment after the contracted funeral benefits have been rendered. This change would at least partially offset the fact that many consumers are now paying income tax on the interest earned on the investment of their contract proceeds.

**8.4 Require that prepaid funeral contracts be written in plain, clear language with full disclosure of services that are and are not provided.**

This recommendation requires prepaid funeral contract sellers to use contracts written in plain language that can be easily understood by the average consumer. The contracts should be printed in a clear font and in a reasonably large type size for easy readability. These requirements would apply to contracts in both English and Spanish. As part of this recommendation, the Department of Banking would have to provide model contracts written in plain, simple language. The Department must also ensure that all prepaid funeral contracts reasonably meet plain language criteria.

As part of this recommendation, all contracts would be required to have a standardized disclosure box listing those funeral goods and services provided by the contract, and those that are not. The disclosures would also include a discussion of the circumstances under which the contract may be altered after death. The Department of Banking would be responsible for ensuring that all contracts use these standardized disclosures.

**Impact**

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Current state law benefits the funeral contract seller to the detriment of the consumer. These recommendations correct that imbalance, and help make prepaid funeral contracts more reasonable investments for Texas consumers. These recommendations also help ensure that state law protects consumers against potential abuses.

These recommendations give Texas consumers fair access to their money and the interest that it earns. These recommendations also work to give consumers reasonable flexibility with their prepaid funeral contracts. For example, Recommendation 8.2 requiring that consumers be allowed to cancel their contracts and receive a reasonable refund gives consumers the flexibility to find contracts elsewhere. Under this recommendation, consumers can cancel their original contract, receive a refund, and use the proceeds to purchase a funeral elsewhere. Consumers do not have this kind of flexibility now.

Requiring the use of plain language, in addition to the use of standardized disclosure boxes, should allow consumers to better understand the contracts they are signing. This improved understanding on the consumer's behalf should lessen the current volume of consumer complaints regarding prepaid funeral contracts. Lastly, the prohibition of finance charges removes a charge that some consumers are unreasonably required to pay.

With the exception of Recommendation 8.4 requiring the use of plain language and standardized disclosures, these recommendations do not require constant compliance monitoring by the Department of Banking. Nevertheless, the Department does maintain enforcement authority over those prepaid funeral contract vendors that fail to meet the requirements of these recommendations.

## **Fiscal Implication**

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Most of these recommendations deal with financial transactions between consumers and contract sellers, not regulatory actions of the Department of Banking. Therefore, these recommendations would have no fiscal impact to the State. The recommendation requiring the Department to monitor contract form can be accomplished using existing resources.

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<sup>1</sup> Texas Department of Banking, *Summary of Annual Report Data From Prepaid Funeral Benefit Contract Holders*, p. 1.

<sup>2</sup> The Texas Credit Code requires all entities that charge finance charges and interest to register with the Office of Consumer Credit Commissioner.

<sup>3</sup> International Cemetery and Funeral Association, *ICFA Survey of Cemetery and Funeral Home Statutes and Regulations, Merchandise and Service Trust*, December 31, 1998.

<sup>4</sup> American Association of Retired Persons, *Preneed Funeral and Burial Agreements: A Summary of State Statutes*, (Washington, D.C., December 1999), p. 6.

<sup>5</sup> *Ibid.*, p. 5.

<sup>6</sup> AARP, *Preneed Funeral and Burial Agreements Fact Sheet*, (Washington, D.C., 1999), p. 3.



## Issue 9

### The Department of Banking Lacks the Authority to Effectively Enforce Statutes Regarding Prepaid Funeral Contracts and Perpetual Care Cemeteries.

#### Summary

##### Key Recommendations

- Authorize the Department of Banking to use administrative penalties against perpetual care cemeteries found in violation of the Code, and authorize the Department to increase penalties for repeat violations by prepaid funeral contract sellers and perpetual care cemeteries.
- Grant the Finance Commission rulemaking authority over perpetual care cemeteries regulated by the Department of Banking.
- Allow the Department of Banking to review all necessary records relating to perpetual care cemeteries.

##### Key Findings

- The Department lacks adequate enforcement authority over perpetual care cemeteries and prepaid funeral contract sellers.
- Despite having rulemaking authority over prepaid funeral contract sellers, neither the Department of Banking or the Finance Commission have broad rulemaking authority with regard to perpetual care cemeteries.
- State law limits the Department of Banking's ability to examine perpetual care cemeteries.

##### Conclusion

The Department of Banking lacks the appropriate authority to regulate prepaid funeral contract vendors and perpetual care cemeteries. Current statute restricts the Department's ability to investigate perpetual care cemeteries, and limits its enforcement powers over cemeteries and prepaid funeral contract vendors with repeat violations. These restrictions preclude the Department from effectively enforcing state statutes. The Sunset review identified several changes that would address these problems, thus better enabling the Department to better enforce its statutes. Giving the Department additional authority would allow for better protection of the consumer's money. **C u r r e n t**

## Support

**Situation:** The Department of Banking oversees prepaid funeral contract sellers and perpetual care cemeteries.

- The mission of the Department of Banking, under the guidance of the Finance Commission, is to ensure the safety and soundness of the financial services system in Texas. In addition to supervising banks, trust companies, and non-bank entities such as check sellers and currency exchange businesses, the Department also oversees perpetual care cemeteries and prepaid funeral contract sellers.
- The Department licenses, regulates, and examines prepaid funeral contract sellers to ensure compliance with the Texas Finance and Administrative Codes. All prepaid funeral contract sellers in Texas are required by law to be licensed by the Department. Each year the Department conducts on-site examinations of all licensees to ensure that consumers' funds are appropriately handled. The Department currently oversees 438 prepaid funeral contract providers with a net worth of \$2.1 billion.
- Perpetual care cemeteries are reviewed by the Department to ensure compliance with the Texas Health and Safety Code. The Department's examiners ensure that consumers' funds are prudently handled and invested, and that the cemeteries are appropriately platted. All perpetual care cemeteries are licensed and examined on-site on an annual basis. Currently, 227 perpetual care cemeteries operate in Texas, with \$157 million in assets. The textbox, *How Perpetual Care Cemeteries Work*, describes these cemeteries in greater detail.
- The Department currently devotes 10.5 of its 138 FTEs to the oversight of prepaid funeral contract sellers and perpetual care cemeteries. During FY 1999, the agency designated \$676,697 of its \$9.1 million budget for these purposes.

### How Perpetual Care Cemeteries Work

When a consumer is interred in a perpetual care cemetery, his or her estate pays a sum into a trust fund to ensure continual maintenance. Those funds are then invested to ensure a continuous form of income, in the form of capital gains and interest, for the cemetery. That income finances the cemetery's continued maintenance and operation.

**Problem:** The Department lacks adequate enforcement authority over perpetual care cemeteries and prepaid funeral contract sellers.

- The Texas Health and Safety Code lists only three violations that perpetual care cemeteries can be held accountable for. Those violations include failure to make deposits into the perpetual care cemetery fund, failure to file the required statement of funds, and failure to pay the annual fee for license renewal.<sup>1</sup> Other types of violations, such as refusal to submit to an examination, inappropriate use of cemetery trust funds, or improper platting of cemetery land, are not addressed in the perpetual care cemetery statute. Further, the statute does not provide enhanced penalties for repeat violations.



- The statute gives the Department of Banking only limited authority to fine perpetual care cemeteries. Current statute allows the Banking Commissioner to fine cemeteries for violations that have not been corrected within 30 days. The Commissioner also has the authority to issue a cease and desist order if a violation has not been corrected within 30 days. Beyond these enforcement actions, the statute does not authorize administrative penalties for violations of the perpetual care cemetery statute.
- While the statute gives the Department of Banking authority to fine prepaid funeral contract sellers, it does not provide enhanced penalties for repeat violations. Currently, prepaid funeral contract sellers are given 30 days to cure a violation. Once cured, the repeat of the same practice is again subject to a 30 day notice. During FY 2000, approximately one-third of all prepaid funeral contract sellers had repeat violations. Consistent, uncorrected violations of state law by prepaid funeral contract sellers can endanger the effectiveness of regulation, and the safety and soundness of consumers' money.

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During FY 2000,  
about one-third of all  
prepaid funeral  
contact sellers had  
repeat violations.

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**Problem: Despite having rulemaking authority over prepaid funeral contract sellers, neither the Department of Banking or the Finance Commission have broad rulemaking authority with regard to perpetual care cemeteries.**

- The Texas Health and Safety Code does not give the Finance Commission or the Banking Commissioner rulemaking authority over perpetual care cemeteries. Although the Commissioner does have the authority to establish certain fees paid by cemeteries, the Finance Commission lacks the broader authority to establish rules.
- The absence of rulemaking authority restricts the Department's authority to enforce the law by limiting its ability to conduct examinations and, more importantly, penalize cemeteries in violation of state law. For example, the statute does not prescribe uniform document requirements for perpetual care cemeteries. Without the ability to do so by rule, the type of information that the Department receives differs from cemetery to cemetery, thereby precluding consistent review and regulation.

**Problem: State law limits the Department of Banking's ability to examine perpetual care cemeteries.**

- Some perpetual care cemeteries have challenged the Department on grounds that the statute does not authorize examiners to look at all of a cemetery's records. The statute states that the books and records of a perpetual care cemetery "relating to its fund" shall be examined by the Department.<sup>2</sup> This includes those records of deposits, withdrawals, or other transactions relating to the perpetual care cemetery fund only. Records not relating to the fund, such as a

cemetery's annual expense report or internal financial statements, are not authorized for inspection by the Code. Other records not authorized for review include consumer complaints and the cemetery's maps and plats. Consequently, some cemeteries have successfully kept these records from the Department's examiners.

- Limitations on the types of documentation available to the Department's examiners precludes their ability to effectively regulate perpetual care cemeteries. Examiners are unable to determine the long-term safety and soundness of a perpetual care cemetery's operation by looking only at the documents relating to its funds. Consequently, the long-term viability of some perpetual care cemeteries may be in question. This is important to the Department, as the regulator, but cannot be assessed under current authority. Further, by not having the authorization to look at consumer complaint files, the Department cannot determine if perpetual care cemeteries, which are licensed by the State, are appropriately serving consumers' needs.

## Recommendation

### Change in Statute

#### **9.1 Authorize the Department of Banking to use administrative penalties against perpetual care cemeteries found in violation of the Code, and authorize the Department to increase penalties for repeat violations by prepaid funeral contract sellers and perpetual care cemeteries.**

This recommendation would authorize the Department to use administrative penalties against perpetual care cemeteries. The applied penalties should be the same as those currently used against prepaid funeral contract sellers to ensure enforcement consistency. The amount of penalty used for each violation should not exceed \$1,000 for each day the violation occurs. The penalty amount used should be tied to the severity of the violation. In addition, the statute should provide for an appeals process for all cemeteries charged with penalties. As part of this recommendation, the Department should have authority over those items in the Code that relate to the functioning of cemetery funds.

This recommendation would expand the Department's authority to fine prepaid funeral contract sellers and perpetual care cemeteries to include increased fines for repeat violations.

#### **9.2 Grant the Finance Commission rulemaking authority over perpetual care cemeteries regulated by the Department of Banking.**

This recommendation would vest the Finance Commission, which oversees the Department of Banking and its regulation of perpetual care cemeteries, with rulemaking authority for perpetual care cemetery regulation. Vesting the Finance Commission with rulemaking authority would improve the Department

of Banking's ability to effectively regulate perpetual care cemeteries. Rulemaking authority would give the Commission greater flexibility to adopt rules that establish requirements that are necessary for effective regulation, but are not specifically prescribed in current law.

### **9.3 Allow the Department of Banking to review all necessary records relating to perpetual care cemeteries.**

This recommendation would authorize the Department to examine the books and records of a perpetual care cemetery other than those relating to its trust fund. These records include, among other items, a cemetery's operating expenses, financial statements, consumer complaint files, and the cemetery's maps and plats.

#### **Impact**

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The intent of these recommendations is to clarify and strengthen the Department of Banking's ability to enforce state laws regarding perpetual care cemeteries and prepaid funeral contract sellers. These recommendations would ensure greater protection of consumers' funds while enhancing the efficiency of the Department's regulation of licensees.

#### **Fiscal Implication**

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These recommendations could have a positive fiscal impact to the State. Increased penalty authority could raise the amount of revenue generated from fines. That amount, however, could not be estimated for this report.

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<sup>1</sup> Texas Health and Safety Code, ch. 712, sec. 712.0441(a).

<sup>2</sup> Texas Health and Safety Code, ch. 712, sec. 712.044(a).



**ACROSS-THE-BOARD RECOMMENDATIONS**

<b>Texas Funeral Service Commission</b>	
<b>Recommendations</b>	<b>Across-the-Board Provisions</b>
	<b>A. GENERAL</b>
Already in Statute	1. Require at least one-third public membership on state agency policymaking bodies.
Update	2. Require specific provisions relating to conflicts of interest.
Already in Statute	3. Require that appointment to the policymaking body be made without regard to the appointee's race, color, disability, sex, religion, age, or national origin.
Already in Statute	4. Provide for the Governor to designate the presiding officer of a state agency's policymaking body.
Already in Statute	5. Specify grounds for removal of a member of the policymaking body.
Already in Statute	6. Require that information on standards of conduct be provided to members of policymaking bodies and agency employees.
Apply	7. Require training for members of policymaking bodies.
Update	8. Require the agency's policymaking body to develop and implement policies that clearly separate the functions of the policymaking body and the agency staff.
Already in Statute	9. Provide for public testimony at meetings of the policymaking body.
Update	10. Require information to be maintained on complaints.
Update	11. Require development of an equal employment opportunity policy.
Apply	12. Require information and training on the State Employee Incentive Program.

<b>Texas Funeral Service Commission</b>	
<b>Recommendations</b>	<b>Across-the-Board Provisions</b>
<b>B. LICENSING</b>	
Update	1. Require standard time frames for licensees who are delinquent in renewal of licenses.
Update	2. Provide for notice to a person taking an examination of the results of the examination within a reasonable time of the testing date.
Update	3. Authorize agencies to establish a procedure for licensing applicants who hold a license issued by another state.
Apply	4. Authorize agencies to issue provisional licenses to license applicants who hold a current license in another state.
Update*	5. Authorize the staggered renewal of licenses.
Already in Statute	6. Authorize agencies to use a full range of penalties.
Already in Statute	7. Revise restrictive rules or statutes to allow advertising and competitive bidding practices that are not deceptive or misleading.
Already in Statute	8. Require the policymaking body to adopt a system of continuing education.

\* This is addressed in Issue 3 in greater detail.

<b>Department of Banking Prepaid Funeral Contract Program</b>	
<b>Recommendations</b>	<b>Across-the-Board Provisions</b>
	<b>B. LICENSING</b>
Already in Statute	1. Require standard time frames for licensees who are delinquent in renewal of licenses.
Not Applicable	2. Provide for notice to a person taking an examination of the results of the examination within a reasonable time of the testing date.
Not Applicable	3. Authorize agencies to establish a procedure for licensing applicants who hold a license issued by another state.
Not Applicable	4. Authorize agencies to issue provisional licenses to license applicants who hold a current license in another state.
Already in Statute	5. Authorize the staggered renewal of licenses.
Apply*	6. Authorize agencies to use a full range of penalties.
Not Applicable	7. Revise restrictive rules or statutes to allow advertising and competitive bidding practices that are not deceptive or misleading.
Not Applicable	8. Require the policymaking body to adopt a system of continuing education.

\* This is addressed in Issue 9 in greater detail.



<b>Department of Banking Perpetual Care Cemetery Program</b>	
<b>Recommendations</b>	<b>Across-the-Board Provisions</b>
	<b>B. LICENSING</b>
Not Applicable	1. Require standard time frames for licensees who are delinquent in renewal of licenses.
Not Applicable	2. Provide for notice to a person taking an examination of the results of the examination within a reasonable time of the testing date.
Not Applicable	3. Authorize agencies to establish a procedure for licensing applicants who hold a license issued by another state.
Not Applicable	4. Authorize agencies to issue provisional licenses to license applicants who hold a current license in another state.
Not Applicable	5. Authorize the staggered renewal of licenses.
Apply*	6. Authorize agencies to use a full range of penalties.
Not Applicable	7. Revise restrictive rules or statutes to allow advertising and competitive bidding practices that are not deceptive or misleading.
Not Applicable	8. Require the policymaking body to adopt a system of continuing education.

\* This is addressed in Issue 9 in greater detail.

## **AGENCY INFORMATION**

# Agency Information

## AGENCY AT A GLANCE

The Texas Funeral Service Commission attempts to ensure professional and ethical funerals by regulating funeral directors, embalmers, and funeral and commercial embalming establishments. Created in 1903 as the State Board of Embalming, the Commission has two statutory functions: licensing; and enforcement. The Commission may impose sanctions, which include administrative penalties ranging from \$100 to \$5,000; suspending, probating, or revoking licenses; or a combination of these sanctions.

### Key Facts

- **Funding.** In fiscal year 2000, the Commission operated with an annual budget of \$512,175, including \$5,000 in appropriated receipts from the sale of Commission publications. The Commission received more than \$867,000 in licensing fees that year, which all went into General Revenue.
- **Staffing.** The Commission employs 10 people, all of whom work in Austin.
- **Licensees.** As of September 2000, the Commission licensed 4,358 individuals as funeral directors or embalmers. The majority of licensees are dually licensed as both an embalmer and a funeral director, although some people hold only a single license. In addition, the Commission licensed 1,327 establishments as funeral homes or commercial embalming establishments. A breakdown of these numbers was not available.
- **Complaints.** In fiscal year 2000, the Commission reviewed 355 complaints, clearing out a significant backlog from previous years. The 355 cases included 12 complaints received in fiscal year 1998, 180 received in fiscal year 1999, and 267 received in fiscal year 2000. The Commission closed 318 cases of the 355 cases reviewed, carrying forward only 37 cases into fiscal year 2001.
- **Investigations.** Of the 355 complaints reviewed in fiscal year 2000, the Commission fully investigated and dismissed 273 after finding no fault or no jurisdiction.

### Mission Statement

The mission of the Texas Funeral Service Commission is to enforce the laws of the State of Texas through the promulgation of rules and by aggressively and fairly enforcing those laws and rules in order to ensure that every funeral in Texas is conducted at the highest level of professional standards and ethical conduct.

### On the Internet

The Commission has a  
Web site at  
[www.tfsc.state.tx.us](http://www.tfsc.state.tx.us)

- **Sanctions.** In fiscal year 2000, the Commission ordered disciplinary action in 79 of the complaint cases, and assessed \$337,300 in administrative penalties in these cases.<sup>1</sup> The Commission collected \$98,239 in administrative penalties, all of which was transferred to General Revenue. Two criminal charges were filed resulting in arrest, and the Commission made two requests for injunctive relief, such as cease-and-desist orders, through the Office of the Attorney General.

## MAJOR EVENTS IN AGENCY HISTORY

- 1903 The Legislature established the State Board of Embalming to license and regulate embalmers in Texas. The focus of the law was containment of contagious diseases.
- 1938 The Legislature added licensing of funeral directors to the Board's functions.
- 1958 The Legislature changed the name of the agency to the State Board of Morticians.
- 1979 The Board went through Sunset review and was continued with expanded authority to protect the public. The legislation increased the five-member Board to nine, consisting of five professionals and four public members.
- 1984 The Federal Trade Commission (FTC) adopted the "Funeral Rule," consisting of consumer protection provisions that the

### FTC Rule on Funeral Industry Practices

The FTC states that regulation of the industry is necessary because funerals involve important social considerations and consumers are often forced to make expensive purchases under tight time constraints and emotional duress. The "Funeral Rule" is designed to protect consumers from unscrupulous business practices and requires that:

- providers of funeral goods and services give consumers itemized price lists of goods and services offered;
- the price lists must state that the consumer has the right to select only the goods and services desired (except for those that may be required by law); alternative containers are available for direct cremations; and the only fee that a consumer can be required to pay is a basic services fee;
- price information be supplied over the telephone if requested;
- funeral providers cannot claim that their goods or services will delay the decomposition of human remains indefinitely;
- funeral providers cannot claim that laws or certain cemeteries require the purchase of any funeral goods or services; and
- funeral providers disclose that embalming is not required and must be authorized by a family member.

funeral industry must follow. These rules applied in a state unless the state applied for and received an exemption from the FTC, by proving that state law provided equal or greater protection. To date, Texas has no such exemption. See the textbox, *FTC Rule on Funeral Industry Practices*, for further information.

- 1987 The Legislature changed the name of Board to the Texas Funeral Service Commission and expanded its enforcement authority to include administrative penalties.
- 1991 The Commission went through Sunset review and Sunset staff recommended abolishment. However, the full Sunset Commission recommended continuing the agency with changes to improve accountability. Most of these changes were adopted by the Legislature and are summarized in the textbox, *1991 Sunset Legislation on the Funeral Service Commission*.
- 1993 The Legislature adjusted the Commission's statute and reversed some of the changes made in 1991 by authorizing two commissioners to participate in any informal conference on cases awaiting hearings and reinstating the requirement for annual, versus biennial, funeral home inspections.
- 1999 The Legislature made a number of substantive changes to the organization and operation of the Commission. Major changes included: changing the Commission membership from five public and four professional members, to four public and two professional members, and requiring that the presiding and assistant presiding officers be public members; eliminating the authority of the agency to employ an in-house general counsel or to contract for the services of an investigator; and giving the agency the authority to exempt a funeral establishment from having an embalming room under certain circumstances.

#### **1991 Sunset Legislation on the Funeral Service Commission**

Key provisions enacted by the 72nd Legislature:

- changed the composition of the nine-member Board to include a majority of five public members;
- prohibited Commissioner participation in informal hearings to avoid the appearance of bias;
- changed the requirement for annual funeral home inspections to biennial inspections to accommodate agency workload;
- required memorandums of understanding between the Department of Banking, the Board of Insurance, and the Commission to better coordinate preneed funeral sales; and between the Commission and the Department of Health on issues related to vital statistics;
- authorized the Board to require continuing education courses for licensees; and
- transferred the Commission's authority to approve mortuary schools to the Texas Higher Education Coordinating Board.

In August 1999, due to significant turnover and the lack of an Executive Director, the Governor's Office requested that the Texas Comptroller of Public Accounts assist the Commission with its operations. The previous Executive Director allegedly mishandled administration of the agency, but she has filed suit for wrongful termination. This case is still pending. The current Executive Director was hired in October 1999.

## ORGANIZATION

### Policy Body

Texas law requires the six-member Funeral Service Commission to oversee the administrative operations of the Commission staff, hire the Executive Director, and take final action on complaints and sanctions against funeral industry licensees. The Governor appoints all six members, four of whom must be public members. The presiding officer, designated by the Governor, and assistant presiding officer, elected annually by the Commission, must be public members. Members serve staggered six-year terms. The chart, *Funeral Service Board Members*, identifies current Board members, their term of office, and their place of residence. The Commission has no committees and makes all decisions as one body. The Commission meets in Austin at least quarterly.

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By law, the two presiding officers of the Commission must be public, rather than industry, members.

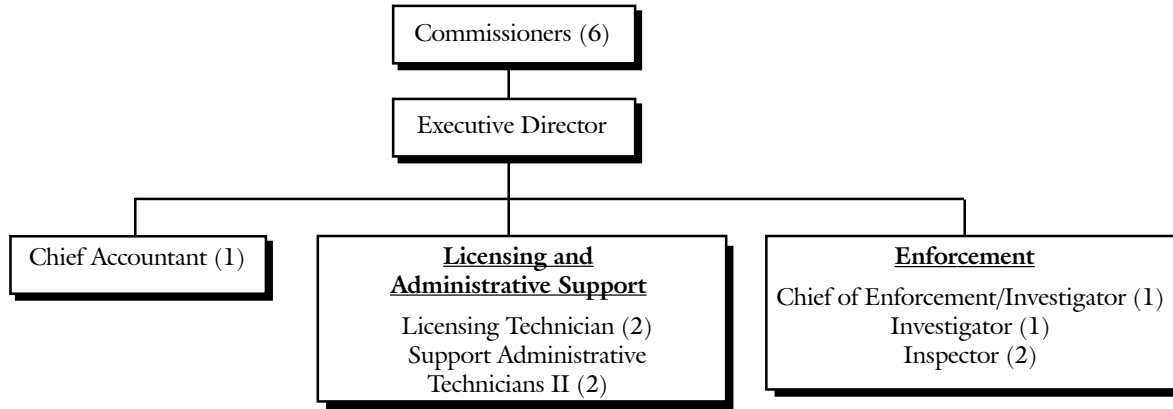
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<b>Funeral Service Board Members</b>			
<b>Name</b>	<b>Term</b>	<b>Membership</b>	<b>Residence</b>
Harry M. Whittington Presiding Officer	September 1999 - February 2001	Public	Austin
Frank W. Maresh Assistant Presiding Officer	September 1999 - February 2001	Public	Hunt
Dorothy L. Grasty	September 1999 - February 2005	Public	Arlington
John Q. Taylor King, Ph.D.	September 1999 - February 2003	Professional	Austin
Martha J. Rhymes	September 1999 - February 2003	Public	White Oak
Jim C. Wright	September 1999 - February 2005	Professional	Wheeler

### Staff

The Commission employs 10 staff, including an Executive Director, all of whom work in its Austin headquarters. The Commission has no field offices, but staff travel throughout the state for inspections, investigations, and formal proceedings. Legal counsel is provided by the Office of the Attorney General, as needed. The *Texas Funeral Service Commission Organization Chart* depicts the organization of the agency's staff. Because the staff size is so small, Sunset staff did not prepare an analysis comparing the Commission's workforce composition to the overall civilian labor force.

**Texas Funeral Service Commission  
Organization Chart**



**FUNDING**

**Revenues**

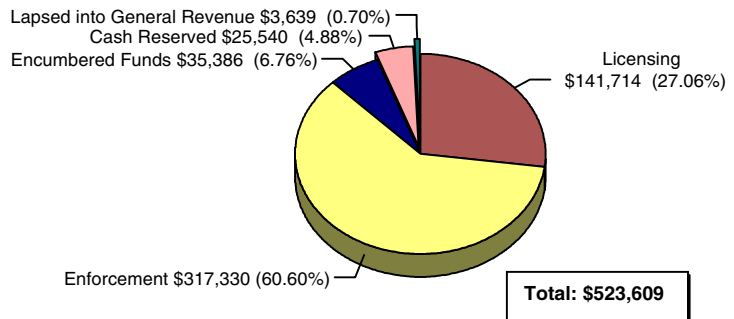
In fiscal year 2000, the Legislature appropriated \$512,175 to the Commission, including \$496,375 in General Revenue, \$10,800 for salary increases, and \$5,000 in receipts from the sale of Commission publications. That same year, the Commission received \$867,418 in professional licensing and continuing education fees, and \$98,239 in administrative penalties and fines assessed against licensees. All of these funds were transferred to General Revenue.

The agency's budget is about one-half of the fee revenue it collects.

**Expenditures**

In fiscal year 2000, the Commission spent \$523,608. Expenditures are shown in detail in the pie chart, *Operating Budget, Fiscal Year 2000*. According to the agency, the \$14,433 difference between budgeted appropriations and actual expenditures was the result of Commission publications sales.

**Operating Budget  
Fiscal Year 2000**



Encumbered funds were used to purchase an Internet server from the Department of Information Resources, four lap top computers, and cameras used by inspection staff to replace several which were stolen from the Commission. The “Cash Reserved” item was funds reserved by the Commission’s previous accountant for salaries.

*Appendix A* shows the Commission’s use of Historically Underutilized Businesses (HUBs) in purchasing goods and services.

## AGENCY OPERATIONS

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The Commission licenses funeral directors, embalmers, funeral homes, and embalming establishments.

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The Commission’s two key functions are licensing and enforcement, as described below.

### **Licensing**

The Texas Occupation Code authorizes the Commission to issue licenses to funeral industry professionals, and to set and collect fees to cover the costs of regulation. The Commission licenses individual funeral directors and embalmers, and funeral homes and commercial embalming establishments. See the textbox, *Entities Licensed by the Commission*, for definitions of these licensee groups. The Commission employs two full-time staff to handle licensing. The licensing processes for individuals and establishments are explained in the following material.

#### **Entities Licensed by the Commission**

**Funeral Director** – A person licensed to sell services to prepare a body, other than embalming, and arrange a funeral.

**Embalmer** – A person licensed to use chemicals to disinfect and preserve a body.

**Funeral Establishment** – A place of business used in the care and preparation for burial of a body. This includes any place of business used only for embalming a body.

### *Funeral Director and Embalmer Licensing*

The licensing of funeral directors and embalmers includes a provisional license, an initial license, and a renewed license. The Commission issues provisional licenses to individuals wanting to become licensed funeral directors or embalmers. Minimum qualifications, as statutorily required, are listed in the textbox, *Minimum Qualifications for Becoming a Funeral Director or Embalmer in Texas*. These minimum requirements are fairly uniform across all 50 states.



Under a provisional license, applicants serve a one- to two-year apprenticeship, during which the licensee practices funeral directing or embalming skills under licensed supervision. As of September 2000, 280 individuals held a provisional license.

If the provisional licensee satisfies all requirements, the Commission issues the embalmer's license, funeral director's license, or dual funeral director and embalmer license, which remains in effect for two years. Texas is unique in that it allows licensees to be singly licensed. According to one of the mortuary colleges, single licenses are becoming more popular with individuals who would like to run the business but not necessarily perform embalmings.<sup>2</sup> As of September 2000, 3,320 individuals held either an embalmer's or a funeral director's license in Texas.

All licenses are renewed in either May or November, at which time licensees must submit a renewal application and satisfy continuing education requirements. Staff review the application and the licensee's record of compliance with the Commission's statute and rules, as well as any felony conviction record. Unless problems are found, Commission staff renew the licenses for another two-year period.

The statute also provides for individuals from other states to be reciprocally licensed as a funeral director or embalmer in Texas.

### Funeral Establishment Licensing

The Commission issues two licenses for funeral establishments: one for funeral homes that offer a full range of funeral services, and one for commercial establishments that only perform embalmings. Commercial embalming establishments work as subcontractors to provide services for licensed funeral homes, and usually do not have any contact with the consumer. As of September 2000, the Commission licensed 1,309 establishments as funeral homes or commercial embalming establishments. For an illustration of requirements, see the textbox, *Establishment Licensing Requirements*.

#### **Minimum Qualifications for Becoming a Funeral Director or Embalmer in Texas**

To be licensed as a funeral director or embalmer, a person must fulfill the following minimum qualifications:

- be 18 years of age or older;
- have graduated from an accredited college of mortuary science;
- pass a written national exam after receiving the mortuary degree and before entering the provisional license period;
- pass a written law exam developed by the Commission, based on Texas laws relating to vital statistics and the preparation and transportation of bodies (this exam can be taken at any time during the provisional license period);
- have served as a provisional licensee under the personal supervision of a licensed funeral director or embalmer; and
- pass an oral exit exam consisting of case scenarios given before one or more Commission members.

#### **Establishment Licensing Requirements**

Full-service funeral homes are statutorily required to meet the following requirements before being licensed:

- have facilities to conduct memorial services;
- meet building, fire safety, and health standards, and be located at a fixed place that is not tax-exempt property or a cemetery;
- have at least one hearse;
- have an embalming room, except if located within 50 miles of a facility where embalming can be performed; and
- have a display room containing sufficient merchandise to permit reasonable selection.

Since commercial embalming establishments do not sell services or merchandise to the public directly, the statute does not require them to comply with the same requirements needed for a funeral home license. Embalming establishments need only ensure that any embalmers it employs are licensed by the Commission.

## Enforcement

The Commission ensures compliance by regularly inspecting funeral establishments and investigating complaints. The agency has two employees for inspections and two for investigations.

### Inspections

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The Commission inspected 97.5 percent of the 1,309 funeral establishments in Texas in FY 2000.

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In addition to initial inspection of new facilities, the Commission is required to annually inspect all funeral establishments in Texas. In fiscal year 2000, the agency inspected 97.5 percent of the 1,309 licensed funeral establishments.

The Commission identifies establishments to be inspected and checks the past inspection record of these locations. Inspectors perform unannounced inspections. If a funeral establishment is closed when the inspector arrives, the owner is required by law to open the establishment. Unless the Commission is at fault, funeral establishments cannot renew their annual license until the inspection has been done.

Inspections typically last from 45 minutes to several hours. Inspectors request that a representative of the establishment come along on the walk-through inspection. The inspector uses a checklist of the various statutory and rule requirements. The textbox, *Funeral Establishment Inspection Items*, lists some of the items reviewed during an inspection. The inspector also notes whether past violations have been corrected.

#### **Funeral Establishment Inspection Items**

A funeral establishment must have a casket display room containing at least five, adult-sized caskets; access to a hearse, a chapel, and a preparation room. A preparation room must have:

- hot and cold running water,
- a rust-proof table, and
- an exhaust fan.

The establishment must also disclose specific information on general purchase agreements used to sell services and products. This information includes:

- the consumer's right to complain to the Commission,
- rights concerning embalming, and
- rights concerning cremation.

At the end of the inspection, the inspector explains the exceptions noted and leaves a copy of the inspection checklist. The establishment has 15 days to submit a report explaining how it will address and correct any deficiencies, such as displaying consumer rights information.

The agency sometimes schedules a reinspection for more flagrant violations, such as unsanitary conditions. Like regular annual inspections, reinspections are unannounced. If the Commission is not satisfied with

an establishment's compliance, the agency may bring enforcement action against that business.

### Complaints

The Commission investigates complaints against its licensees as one of its activities to protect the public. Anyone can initiate these complaints, including Commission staff, consumers, and funeral establishments. In fiscal year 2000, the agency received 267 complaints, reviewed 355 complaints, closed 273 cases, and assessed administrative penalties in 79 of the cases but a breakdown of categories of violation was not available. These 355 complaints reviewed included 12 complaints received in fiscal year 1998 and 180 complaints received in fiscal year 1999. A complaint is not considered closed until it has been fully adjudicated or, when applicable, until penalties have been collected.

The flowchart, *Complaint Process*, illustrates how the Commission handles complaints. The Commission acknowledges the receipt of a complaint in writing and sends the complainant a complaint form to complete. Once returned, the Commission determines whether the complaint alleges a violation within its jurisdiction. If not, the complaint is sent to another agency with responsibility. The textbox, *Interagency Coordination of Funeral-Related Activities*, shows the division of responsibilities between the Commission and other state agencies on preneed services and death records.

If the Commission has jurisdiction over the complaint, the agency initiates a formal investigation and requests a response from the licensee. The investigator makes telephone calls or visits in person to determine the facts of the complaint. Staff investigators describe each case to the Commission members at one of the Commission's public meetings. Based on the Executive Director's recommendation, Commission members make an initial determination of either fault or no fault.

If the Commission finds fault, it may impose a range of sanctions on violators, including a reprimand, or the probation, reprimand, suspension, or revocation of a license. The Commission may also vote to impose an administrative penalty or any combination of sanctions and penalties. If the Commission recommends a penalty, the Executive Director later assesses a fine and notifies the licensee. The licensee then has 30 days to pay the fine or request an informal or formal hearing.

#### **Interagency Coordination of Funeral-Related Activities**

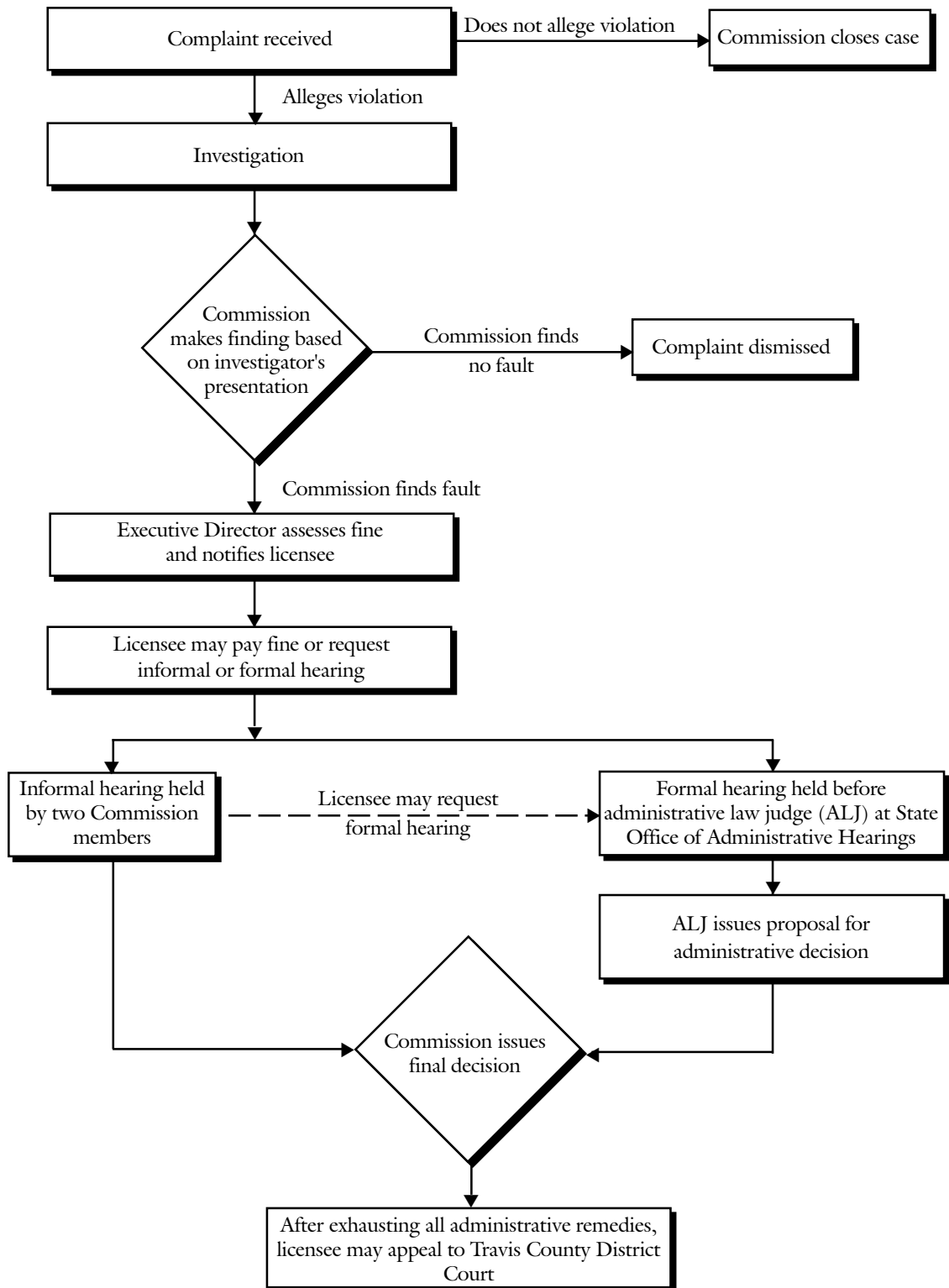
##### **Preneed Funeral Contracts:**

The Funeral Service Commission, the Department of Banking (DOB), and the Texas Department of Insurance (TDI) have entered into an agreement that the Funeral Service Commission will forward complaints about preneed funeral contracts to the appropriate agency. DOB issues permits and regulates preneed contracts, and TDI regulates insurance carriers who issue insurance policies that pay for preneed contracts at the same time of death.

##### **Death Certificates:**

The Texas Department of Health and the Commission have signed an agreement that outlines responsibilities for enforcing vital statistics requirements, such as filing death records.

### Complaint Process



If the licensee chooses an informal hearing, two Commission members meet with the licensee to discuss the case. If the licensee is still unsatisfied with the decision, he or she may request a formal hearing before an administrative law judge of the State Office of Administrative Hearings.

The full Commission makes the final decision after an informal or formal hearing. After Commission action, a licensee may request a rehearing or, if the Commission denies a rehearing, the licensee may file an appeal in the state district court of Travis County.

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<sup>1</sup> This figure includes all administrative penalties and fines assessed for violations such as delinquency in renewing licenses and reinspection fees. Some penalties remain uncollected because respondents are either in bankruptcy or can not be found by the State. In addition, some penalties were assessed against non-licensed professionals and the Commission's enabling statute does not provide authority to collect administrative penalties against non-licensees, except through civil litigation through the Office of the Attorney General. These amounts may have been reduced or rescinded as the result informal conferences between the respondent and the Commission.

<sup>2</sup> Telephone interview with San Antonio College Mortuary Science Program, Coordinator (Austin, Texas, October 17, 2000).



# **APPENDICES**

## Appendix A

### Results of Sunset Survey of Funeral Industry Professionals and Complainants

As part of this review, Sunset staff designed a survey to obtain input from individuals and groups who have dealt with the Texas Funeral Service Commission. In August 2000, Sunset staff sent this survey to 165 individuals who filed a complaint with the Commission, 151 professional members, and 25 interest groups for a total of 341.

Sunset staff received 92 responses, or 27 percent, of the total number of people surveyed. This number included responses from 36 people who filed a complaint with the Commission; 47 funeral directors, owners of a funeral home, embalmers, or owners of an embalming establishment (two of whom also filed a complaint); six industry interest groups (their responses were included with the professional members); and three consumer groups.

The chart below summarizes the responses and shows selected comments made by survey respondents. Sunset staff did not attempt to verify the comments and does not present them as facts.

<b>Survey Results</b>	
<b>Question</b>	<b>Responses</b>
Should Texas state government be regulating and licensing the funeral service industry? Why or why not?	<p>All of the respondents to the survey answered yes. Many <b>professional members</b> and <b>complainants</b> said regulation is necessary to protect the public.</p> <p><b>Professional members'</b> comments included the following:</p> <ul style="list-style-type: none"> <li>• “Yes - We must maintain high standards, an unrepachable work ethic, and strict adherence to the laws of the State of Texas.”</li> <li>• “Yes, but not by people who are not funeral directors.”</li> <li>• “Yes, our industry is viewed by some as opportunistic and will continue to need close scrutiny from both state and federal agencies.”</li> </ul> <p><b>Complainants'</b> comments included the following:</p> <ul style="list-style-type: none"> <li>• “Yes, I feel that the funeral service industry takes advantage of a family when they are at their weakest moments.”</li> </ul>
Should the regulation be expanded to include other professionals and establishments in the funeral service industry? (For example, currently cemeteries and crematories are exempt from regulation.) If so, why?	<p>Most respondents answered yes.</p> <p><b>Professional members'</b> responses included the following:</p> <ul style="list-style-type: none"> <li>• “It is not logical that funeral service is regulated and that cemeteries, crematories, and casket stores are not. In a sense, all of these are funeral service providers.”</li> <li>• “I think this should also include casket sellers. We all need to be on the same level of regulation. To preserve the public trust.”</li> </ul> <p>A <b>consumer group</b> responded as follows:</p> <ul style="list-style-type: none"> <li>• “In a review of nearly 300 complaints filed in 1998 and 1999, we found that a number were against monument companies and cemeteries... Though the Attorney General's Office attempts to mediate complaints between businesses and consumers, their authority is limited.”</li> </ul>



## Appendix A

<b>Survey Results</b>	
<b>Question</b>	<b>Responses</b>
<p>Overall, how effective is the Commission at regulating the funeral industry? Please explain.</p>	<p>Responses to this question were mixed, though many felt that Commission leadership is not effective.</p> <p><b>Professional members'</b> responses included:</p> <ul style="list-style-type: none"> <li>● "They do a good job. However, since the consumers have been added to the commission, it is weaker. They have less knowledge of the industry."</li> <li>● "Our commission finally has some teeth to it."</li> </ul> <p><b>Complainants'</b> responses included:</p> <ul style="list-style-type: none"> <li>● "They are very effective. They listen to the complaint and the funeral home directors."</li> <li>● "Not at all effective. They never force any providers to give satisfactory service because they do not have a set of standards to follow."</li> </ul> <p>A <b>consumer group</b> responded as follows:</p> <ul style="list-style-type: none"> <li>● "While more recently the commission has taken steps to improve oversight, it is hampered by the lack of appropriate funding to hire investigators and is not organized to administratively be able to handle complaints and enforcement."</li> </ul>
<p>Is some other agency or group better equipped to perform the Commission's duties?</p>	<p>Almost all of the <b>professional members</b> said no better agency could perform the Commission's duties, though a few suggested the Texas Department of Health. <b>Professional members'</b> responses included:</p> <ul style="list-style-type: none"> <li>● "No! Please don't ask some agency that does not understand funerals to regulate it. Also do not dilute the board to the point that no licensed people are on it."</li> </ul> <p>Most <b>complainants</b> said no or that they did not know of a better agency to perform the Commission's duties. Some suggested the Department of Human Services, Department of Health, and the Office of the Attorney General.</p> <p>A <b>consumer group</b> responded as follows:</p> <ul style="list-style-type: none"> <li>● "The Commission should be reformed to become a consolidated agency to handle matters now performed by the funeral service commission, the banking department, and the insurance department, along with authority over unregulated aspects of the funeral service industry."</li> </ul>

## Appendix A

<b>Survey Results</b>	
<b>Question</b>	<b>Responses</b>
<p>How well does the Commission make information about the agency and its complaint process easily accessible? Is the information easy to understand?</p>	<p>Almost half of the <b>complainants</b> said the Commission does not make its information easily accessible. <b>Complainants</b> responded as follows:</p> <ul style="list-style-type: none"> <li>● “I accidentally found out about the Commission.”</li> <li>● “Before I filed my complaint, I had no idea the Commission existed. The agency should do public service announcements.”</li> <li>● “Yes on both counts. The Commission explained the procedure that was to be used.”</li> </ul> <p>One-third of <b>professional members</b> said the Commission does not make its information accessible. <b>Professional members’</b> responses included the following:</p> <ul style="list-style-type: none"> <li>● “This is one area the Commission needs to work on. At one time we received a regular newsletter. It was very helpful.”</li> <li>● “Information is readily available and easy to understand.”</li> </ul> <p>A <b>consumer group</b> responded as follows:</p> <ul style="list-style-type: none"> <li>● “...in cases of suspected deceptive funeral or burial practices, most [of our] members say they would turn to the Better Business Bureau (61%) or the State Attorney General’s Office (45%). This clearly illustrates the lack of consumer complaint education and access.”</li> </ul>
<p>How can the Commission improve the information it provides?</p>	<p><b>Professional members’</b> responses included the following:</p> <ul style="list-style-type: none"> <li>● “Needs to provide industry with current information. Commission should mail information to all funeral homes to ensure that everyone receives it rather than having the Executive Director travel around the state, trying to attend poorly attended meetings.”</li> <li>● “Regular newsletter and/or updated Web site.”</li> <li>● “Just send out any new information more often. I can often find out new rules faster through industry sales people.”</li> </ul> <p><b>Complainants’</b> responses included the following:</p> <ul style="list-style-type: none"> <li>● “Make the language more understandable to the average person. Give some ideas where to find the laws and regulations.”</li> <li>● “Give fact and not fictional information.”</li> </ul> <p><b>Consumer groups</b> responded as follows:</p> <ul style="list-style-type: none"> <li>● “The Commission should collect funeral service and cemetery price lists and publish them — in brochure and electronic format — in a regularly updated consumer price guide.”</li> <li>● “Information should be communicated in plain language to help consumers rights and remedies.”</li> </ul>

## Appendix A

<b>Survey Results</b>	
<b>Question</b>	<b>Responses</b>
Should other funeral-related businesses, such as casket stores, be required to provide the same consumer rights information that funeral homes are required to provide?	<p>Overall, responses were yes.</p> <p><b>Professional members'</b> responses included the following:</p> <ul style="list-style-type: none"> <li>● "Casket stores and anyone related to the industry. Casket stores should be required to disclose the same information that funeral homes do."</li> <li>● "...a proficiency test of those personnel, if not licensed, would make for a more informed decision by the lay public."</li> <li>● "The casket store near us says things that would cost me my license."</li> </ul> <p>A <b>consumer group</b> responded as follows:</p> <ul style="list-style-type: none"> <li>● "A review of filed complaints indicated that this is not only wanted, but needed. People should have access to information in places other than the funeral home."</li> </ul>
How well does the Commission process license applications, both provisional and renewal? For example, are applications processed in a timely manner?	The majority of <b>professional members</b> said license applications are processed in a timely manner, several said the timeliness has improved, and some said it was very slow.
Are there any improvements that the Commission could make to its application or renewal process?	<p>Many <b>professional members</b> had no suggestions for improving the licensing process. Some suggested adding more staff and reducing staff turnover, and several recommend improving timeliness. Several also suggested using the Internet. <b>Professional members'</b> responses included the following:</p> <ul style="list-style-type: none"> <li>● "Cease the constant losing of paperwork. Cease the inconsistent information being given out."</li> <li>● "I fail to understand why, in the age of computer technology, that they run so slowly on renewals."</li> </ul>
Are there any improvements that the Commission could make to the continuing education process?	<p>Many <b>professional members</b> said the Commission needs to improve its record keeping of licensees' continuing education credits. Several suggested making credits easier to obtain, especially for rural funeral directors, by including correspondence courses. <b>Professional members'</b> responses included the following:</p> <ul style="list-style-type: none"> <li>● "I think the Commission needs to have more direct communication to those who hold licenses in Texas by newsletter, etc..."</li> <li>● "Random checks to make sure education offerings are not commercials."</li> <li>● "The [continuing education] program is on autopilot."</li> </ul>

## Appendix A

<b>Survey Results</b>	
<b>Question</b>	<b>Responses</b>
<p>Does the Commission handle complaints in a timely manner?</p>	<p>Most <b>professional members</b> either said yes or did not know. Several said no. <b>Professional members'</b> responses included the following:</p> <ul style="list-style-type: none"> <li>● "I filed a complaint in December of 1998 and first heard of the investigation in August of 1999."</li> <li>● "I know a funeral director who was advised 30 days prior to the last Commission meeting that there was a complaint against his firm scheduled for hearing at that meeting. The complaint had been filed two years previous and he was completely unaware of the complaint."</li> </ul> <p><b>Complainants</b> were evenly split about the Commission handling complaints in a timely fashion, half answering yes and half answering no. <b>Complainants'</b> responses included the following:</p> <ul style="list-style-type: none"> <li>● "Timely but inaccurate."</li> <li>● "Since it took a year plus numerous phone calls, I would say no."</li> </ul> <p>A <b>consumer group</b> responded as follows:</p> <ul style="list-style-type: none"> <li>● "The Commission still appears to be trying to organize. However, with a backlog of complaints and without adequate resources, an effective administrative complaint process is not likely to be possible."</li> </ul>
<p>How well does the Commission keep the individuals and establishments involved in a complaint informed of their case status?</p>	<p>Most <b>professional members</b> said they did not know or did not answer. Of those who did know, slightly more answered well than poorly.</p> <p>Most <b>complainants</b> said not very well. <b>Complainants'</b> responses included the following:</p> <ul style="list-style-type: none"> <li>● "They only gave me info about the complaint when I phoned them. I received my notice that the hearing would be heard...one hour after the hearing (began). It doesn't give the impression that you are really invited to the hearing, does it?"</li> <li>● "It took quite a while until I was informed of their action. I did not get any details as to their final decision or what penalty was assessed."</li> </ul> <p>A <b>consumer group</b> responded that the agency's enabling statute requires that the agency notify a complainant of the status of their complaint at least quarterly until final resolution.</p>

## Appendix A

<b>Survey Results</b>	
<b>Question</b>	<b>Responses</b>
<p>How thoroughly does the Commission investigate complaints?</p>	<p>Most <b>professional members</b> either did not answer or did not know. Those that answered were evenly divided between well and not well. <b>Professional members'</b> responses included the following:</p> <ul style="list-style-type: none"> <li>• “They don’t. They levy fines on individuals and establishments without thoroughly investigating the case.”</li> <li>• “It is our understanding this past year they were understaffed and were not able to investigate complaints as they should be able to do.”</li> <li>• “I do have a problem with a firm or director who has been found ‘not at fault’ receiving a letter from the Commission’s Executive Director stating that although they were found to be not at fault, they probably were doing something wrong. Isn’t that guilty even after found innocent?”</li> </ul> <p>Most <b>complainants</b> said the Commission did a poor job of investigating complaints. <b>Complainants'</b> responses included the following:</p> <ul style="list-style-type: none"> <li>• “We never heard if anything beyond a telephone call was ever involved in the investigation process.”</li> <li>• “I don’t know because they do not tell you what they found in their investigation.”</li> </ul> <p><b>Consumer groups</b> responded as follows:</p> <ul style="list-style-type: none"> <li>• “The Commission is not adequately organized to thoroughly handle complaints in a timely fashion. The Commission does not have the administrative capacity or enough investigators.”</li> <li>• “A complaint to the Commission is routinely a paper process. Witnesses are rarely contacted, rather, agencies write an initial letter to the company or funeral home and forward a copy of the company’s answer to the consumer with a cover letter. This type of complaint resolution is not uncommon among state agencies, but is inadequate.”</li> </ul>
<p>How well does the Commission explain what complaints it can and cannot investigate, and why complaints might be referred to other state agencies?</p>	<p>Many <b>professional members</b> did not answer or did not know. Those that answered were split between well and not well. <b>Professional members'</b> responses included the following:</p> <ul style="list-style-type: none"> <li>• “It seems to pass the buck often when it should be handling a complaint.”</li> <li>• “From our observations, the Commission does well in explaining why certain complaints cannot be acted upon. Complainants who are referred to other state agencies are provided reasons, such as statutory authority and/or limitations.”</li> </ul>

## Appendix A

<b>Survey Results</b>	
<b>Question</b>	<b>Responses</b>
<p>How well does the Commission explain what complaints it can and cannot investigate, and why complaints might be referred to other state agencies? (<i>cont.</i>)</p>	<p>Most <b>complainants</b> said not well.</p> <p><b>Consumer groups</b> responded as follows:</p> <ul style="list-style-type: none"> <li>● “[We are] concerned that there is a lack of coordination between agencies and follow-up across agencies on complaints. Furthermore, there is a lack of follow-up with the consumer.”</li> <li>● “The Commission’s consumer complaint form outlines the jurisdiction various agencies have over portions of the funeral services industry. In our review of funeral services complaints, we found that about 9 percent of complaints were classified as ‘non-jurisdictional complaints’ meaning they were immediately forwarded to another agency for handling.”</li> </ul>
<p>How can the Commission improve its complaint process?</p>	<p>Several <b>professional members</b> suggested hiring more investigators. <b>Professional members’</b> responses included the following:</p> <ul style="list-style-type: none"> <li>● “Keep all parties informed of where they are in the process.”</li> <li>● “I think that each member of the commission should be involved in the process. From what I have observed at commission meetings, the whole commission depends on the recommendation of the Executive Director on whether the complaint is valid or not. They appear to have no knowledge of the complaint prior to the meeting.”</li> <li>● “Fines on most part are way too high. Some little mistakes a funeral director makes have excessive fines.”</li> <li>● “Information obtained after investigating the complaint should be public information.”</li> <li>● “By also protecting licensees from licensees.”</li> <li>● “Give it the power to enforce the laws.”</li> </ul> <p>Several <b>complainants</b> suggested improving communication and timeliness. <b>Complainants’</b> responses included the following:</p> <ul style="list-style-type: none"> <li>● “By adding staff, placing under guidance of Attorney General’s Office, being more visible to the public.”</li> <li>● “Completely replace it!”</li> <li>● “Make it a requirement for the funeral industry to inform families about the commission and how they can file a complaint.”</li> <li>● “Hire more investigators and pay them better.”</li> <li>● “Be independent and not beholden to the funeral industry.”</li> </ul>

## Appendix A

<b>Survey Results</b>	
<b>Question</b>	<b>Responses</b>
How can the Commission improve its complaint process? ( <i>cont.</i> )	<p>A <b>consumer group</b> responded as follows:</p> <ul style="list-style-type: none"> <li>● “The Commission should be reformed to become a consolidated agency to handle complaints now referred to other agencies, along with authority over unregulated aspects of the funeral services industry...The agency should promptly review consumer complaints and institute appropriate action and should retain and analyze records of complaints to identify emerging issues.”</li> </ul>
Overall, how effectively does the Commission address fraudulent or unprofessional behavior among funeral industry professionals?	<p>Of the <b>professional members</b> that answered, two-thirds said well and one-third said not well. <b>Professional members’</b> responses included the following:</p> <ul style="list-style-type: none"> <li>● “They don’t address it at all unless someone complains. Then the process is so slow and muddled that the parties involved can be retired in the Bahamas by the time they get around to doing anything.”</li> <li>● “They don’t address it at all, in fact they chastised me for making a complaint against a funeral director that slandered myself and another director working at our establishment.”</li> <li>● “Satisfactory but room for improvement. Usually too strict on minor infractions and too lax on major problems.”</li> <li>● “It doesn’t. It is allowing institutions to run a business without licenses. There are also numerous convicted felons licensed in the State of Texas that should not be.”</li> <li>● “With the new director, I think they are doing a great job.”</li> </ul> <p>Most <b>complainants</b> said not well. Others did not know or said well. <b>Complainants’</b> responses included the following:</p> <ul style="list-style-type: none"> <li>● “Seems to have a protective posture to the industry and is not consumer oriented or victim oriented.”</li> <li>● “They don’t. They never enforced anything. It was always not in their jurisdiction.”</li> <li>● “It did a good job with my simple complaint.”</li> </ul> <p>A <b>consumer group</b> responded as follows:</p> <ul style="list-style-type: none"> <li>● “Substantive changes are required to address fundamental problems in the funeral services industry. The sale of prepaid trust and insurance-funded products may involve unprofessional behavior.”</li> </ul>
Are the Commission’s fines adequate to effectively sanction and deter fraudulent behavior?	<p>Most <b>professional members</b> said yes, though many said no or did not know. <b>Professional members’</b> responses included the following:</p> <ul style="list-style-type: none"> <li>● “Currently, yes. Consider increase for repeat violators.”</li> <li>● “Overall, they seem to be in line. I have noticed that they are not consistent, however, and sometimes it appears that the fine is based on who the firm or individual is, rather than on the severity of the behavior.”</li> </ul>

## Appendix A

<b>Survey Results</b>	
<b>Question</b>	<b>Responses</b>
<p>Are the Commission's fines adequate to effectively sanction and deter fraudulent behavior? (<i>cont.</i>)</p>	<ul style="list-style-type: none"> <li>● "I think stiffer penalties can do more to deter fraudulent behavior."</li> <li>● "(The fines) must be applied to the large corporations as well as individual funeral homes."</li> <li>● "I believe the fines are being raised, not only to deter such behavior in the future, but also to make the Commission a moneymaker, or at the very least, a self-supporting state agency."</li> </ul> <p>Almost all <b>complainants</b> said they did not know, several because the Commission did not tell them what fines were assessed as a result of their complaint. <b>Complainants'</b> responses included the following:</p> <ul style="list-style-type: none"> <li>● "No. They are apparently not enforced, and if they were at least a portion should be given to the families that they wronged."</li> <li>● "All the Commission tells the complainant is that the fine will be sanctioned. We are never told amounts or penalties such as revocation of license."</li> </ul> <p>A <b>consumer group</b> responded as follows:</p> <ul style="list-style-type: none"> <li>● "Now that the market has a significant presence of large corporations, fines should be enhanced to be sure they provide a disincentive to deceptive, unethical, or otherwise illegal practices."</li> </ul>
<p>Please add any other comments about the Texas Funeral Service Commission. If you suggest any changes, please provide:</p> <ol style="list-style-type: none"> <li>1. a brief statement of the suggested change;</li> <li>2. background information on how the current system works and a description of what you would like to see changed;</li> <li>3. benefits of your recommended change; and</li> <li>4. any potential difficulties that may arise from implementing your</li> </ol>	<p>Several <b>professional members</b> said staff turnover is a problem, and that the Executive Director should be an experienced funeral director and embalmer. Several also suggested having a majority of industry members on the Commission. <b>Professional members'</b> responses included the following:</p> <ul style="list-style-type: none"> <li>● "I would like to see additional industry members. A number of states have designated slots for appointees, i.e. two independent funeral directors, one corporate funeral director, and three public members, etc."</li> <li>● "We feel that the Legislature should appoint a board of investigators to look into possible favoritism to corporate establishments versus independent establishments."</li> <li>● "It has always been my understanding that the revenue from renewals is what was used to maintain the Commission. I was also under the impression that no other state money supports this agency."</li> <li>● "I believe that the Funeral Service Commission should be sunsetted and licensing turned over to the state Department of Health."</li> </ul>



## Appendix A

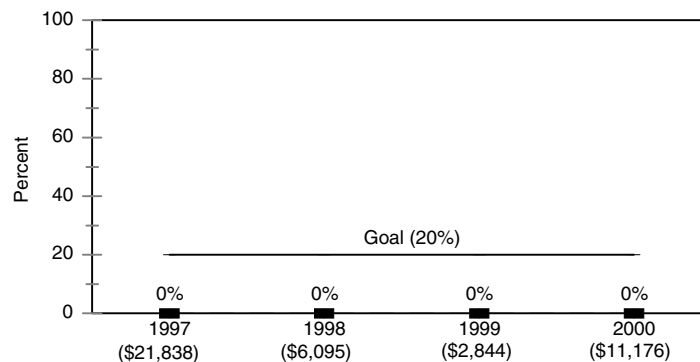
<b>Survey Results</b>	
<b>Question</b>	<b>Responses</b>
<p>recommendation. Please add any other comments about the Texas Funeral Service Commission. If you suggest any changes, please provide:</p> <ol style="list-style-type: none"> <li>1. a brief statement of the suggested change;</li> <li>2. background information on how the current system works and a description of what you would like to see changed;</li> <li>3. benefits of your recommended change; and</li> <li>4. any potential difficulties that may arise from implementing your recommendation. (<i>cont.</i>)</li> </ol>	<ul style="list-style-type: none"> <li>● “The Commission will need more inspectors and investigators (thus more money).”</li> </ul> <p><b>Complainants’</b> responses included the following:</p> <ul style="list-style-type: none"> <li>● “...I felt totally taken advantage of...By the time I figured out what was happening, about 20 hours later, I was in debt for over \$4,500 with my mother having paid for pre-need many years.”</li> <li>● “Make sure all plans sold are complete and nothing left open to be a surprise in the future.”</li> <li>● “I have found the Commission completely useless and a waste of time and money. In my own case I was completely ignored and needless to say unhappy.”</li> <li>● “The Board should not be made up of people in the industry.”</li> <li>● “Protect consumers from big corporations not complying with contracts.”</li> <li>● “Wipe it out and start anew.”</li> <li>● “This is the most difficult time in a person’s life, we do not need to keep reliving it because we are in court for something the funeral home did.”</li> <li>● “I am impressed at how much gets accomplished with the small number of people working at the Commission.”</li> <li>● “I don’t think I would have gotten my money back for my mother’s head stone if I had not filed a complaint with the TFSC.”</li> </ul> <p>A <b>consumer group</b> suggested prohibiting finance charges for funeral goods and services that are prepaid and reforming prepaid contracts to assure full refunds, transferability and allow changes.</p>

## Appendix B

### Historically Underutilized Businesses Statistics 1997 to 2000

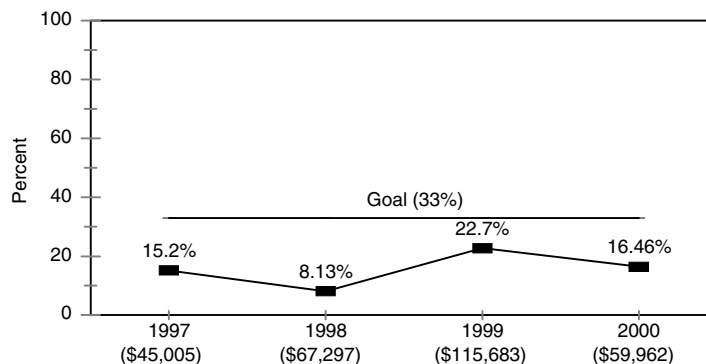
The Legislature has encouraged state agencies to use Historically Underutilized Businesses (HUBs) to promote full and equal opportunities for all businesses in state procurement. In accordance with the requirements of the Sunset Act, the following material shows trend information for the Texas Funeral Service Commission's use of HUBs in purchasing goods and services.<sup>1</sup> The Commission maintains and reports this information under guidelines in the General Services Commission's enabling statute.<sup>2</sup> In the charts, the flat lines represent the goal for each purchasing category, as established by the General Services Commission. The dashed lines represent the Commission's actual spending percentages in each purchasing category from 1997 to 2000. Finally, the number in parentheses under each year shows the total amount the Commission spent in each purchasing category.

#### Professional Services



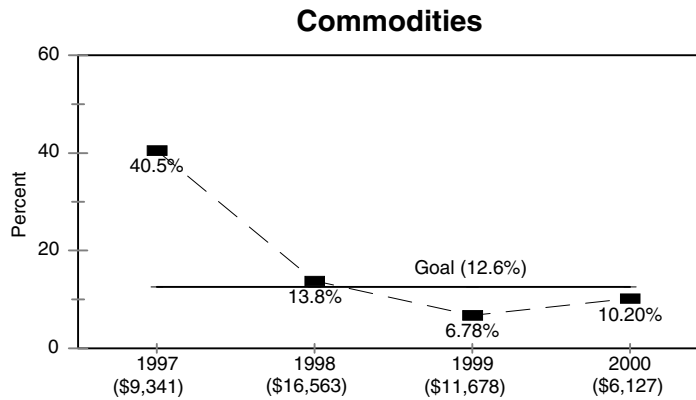
From 1997 to 2000, none of the Commission expenditures for professional services went to a HUB.

#### Other Services

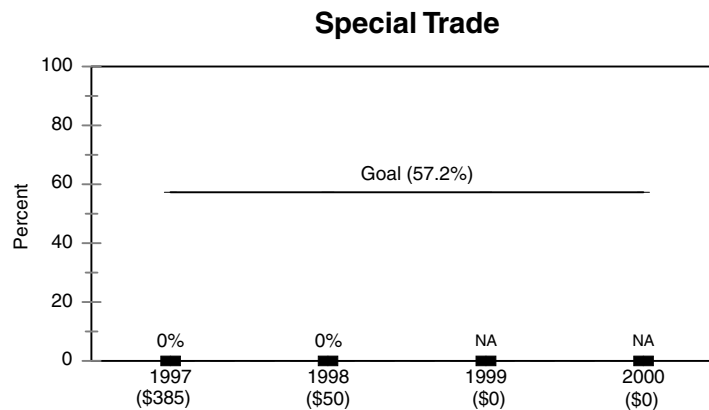


While improving in 1999, the Commission fell below the state goal for all four years in this category.

## Appendix B



While the Commission significantly exceeded the state goal for the purchase of commodities from HUBs in 1997, it dropped below the goal in 1999 and 2000.



The Commission's limited expenditures in this category fell below the state goal in 1997 and 1998, but the agency had no expenditures in this category in 1999 and 2000.

<sup>1</sup> Texas Government Code Ann., ch. 325, sec. 325.011(9)(B) (Vernon 1999).

<sup>2</sup> Texas Government Code Ann., ch. 2161. (Some provisions were formerly required by rider in the General Appropriations Act).

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## **Appendix C**

### **Staff Review Activities**

The Sunset staff engaged in the following activities during the review of the Texas Funeral Service Commission.

- Worked with the Commission Executive Director and staff.
- Met and spoke on the phone with Commission members.
- Reviewed agency documents, reports, and complaint files.
- Attended public meetings of the Commission and reviewed past tapes and minutes of meetings.
- Worked with the State Auditor's Office, Legislative Budget Board, Office of the Attorney General, the Office of the Comptroller, Governor's Budget Office, Texas Department of Banking, Texas Department of Insurance, Texas Department of Licensing and Regulation, Texas Department of Health, and legislative committees.
- Reviewed Texas and other state funeral statutes.
- Researched federal regulation of the funeral industry using Federal Trade Commission and U.S. General Accounting Office documents.
- Reviewed reports by the State Auditor's Office, Consumers Union, and American Association of Retired Persons.
- Met with or interviewed over the phone, Consumers Union, American Association of Retired Persons, Austin Memorial and Burial Society, FAMSA~Funeral Consumers Alliance, Save Texas Cemeteries, Inc., Public Citizen, Inc., International Cemetery and Funeral Association, Texas Funeral Directors Association, individual Texas funeral industry professionals, and funeral industry consumers.
- Went on funeral home inspections with a Commission inspector.
- Met with an Austin area funeral director and toured the facilities.
- Surveyed people who filed complaints with the Commission, funeral directors, embalmers, funeral school directors, industry associations, and consumer groups.
- Attended a roundtable discussion to develop standard operating procedures between funeral director training school staff and Commission staff.
- Performed comparative research of other states' funeral service organizations by searching the Internet and reviewing publications by other states' agencies.



**SUNSET REVIEW OF THE  
FUNERAL SERVICE COMMISSION**

**Report Prepared By:**

**Erica Wissolik - Project Manager**

Lisa Mogil  
Amy Trost  
Steve Hopson  
Cee Hartley

Department of Banking Issues prepared by:  
Jeremy Mazur - Project Manager

Ginny McKay - Project Supervisor

JOEY LONGLEY  
DIRECTOR

Sunset Advisory Commission  
P.O. Box 13066  
Robert E. Johnson Bldg., 6th Floor  
1501 N. Congress Ave.  
Austin, Texas 78711  
[www.sunset.state.tx.us](http://www.sunset.state.tx.us)

(512) 463-1300  
FAX (512) 463-0705