



# SUNSET ADVISORY COMMISSION

State Office of  
Administrative  
Hearings



Staff Report  
August 2002

**STATE OFFICE OF ADMINISTRATIVE HEARINGS**

**SUNSET STAFF REPORT**

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# SUMMARY



## Summary

### Sunset Staff Report

## State Office of Administrative Hearings

The State Office of Administrative Hearings (SOAH) represents the evolution of administrative law in Texas. As state agencies gained administrative authority over the years to act on matters under their purview without having to go to the courts, the Legislature came to see the risks and potential conflicts of having the same agency that establishes, implements and enforces policies also sitting in judgment of persons affected by those policies. The Legislature created SOAH to eliminate those potential conflicts by providing independent administrative hearings for state agencies. It has continued to endorse the concept of a central hearings office by transferring additional responsibilities to SOAH in every legislative session since SOAH's creation.

The Sunset review sought to determine if the Legislature's confidence in SOAH is justified and if any impediments may prevent the Office from serving its mission. The review also considered whether SOAH can appropriately assume additional hearing responsibilities. Sunset staff found that SOAH has proven successful with regard to its centralized hearings function, ensuring better economies of scale and a more neutral setting for hearings than conducting hearings in-house within state agencies.

Despite SOAH's general success, its billing process for paying for some agencies' hearings may harm those agencies' ability to seek hearings and SOAH's perception as an impartial tribunal. Sunset staff found that providing more direct funding to SOAH would ensure greater certainty in its funding levels and provide a greater focus on the hearings and less on funding concerns. Sunset staff also found that SOAH is the appropriate place to conduct hearings for the Texas

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***SOAH ensures better economies of scale and a more neutral setting for hearings than agencies can provide in-house.***

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Department of Licensing and Regulation, which had been identified for possible consolidation in the earlier Sunset review of that agency.

Specific recommendations resulting from Sunset staff's analysis are summarized in the following material.

*For more information, contact Jeremy Mazur, (512) 463-1300. Sunset staff reports are available online at [www.sunset.state.tx.us](http://www.sunset.state.tx.us).*

## **Issues / Recommendations**

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### **Issue 1 Texas has a Continuing Need for an Independent Office of Administrative Hearings.**

#### **Key Recommendations**

- Continue the State Office of Administrative Hearings for 12 years.
- SOAH should take management actions to address certain administrative concerns.

### **Issue 2 The Current Billing Process for Hearings Causes Problems for Both the Referring Agencies and SOAH.**

#### **Key Recommendations**

- Require that the State Office of Administrative Hearings receive a lump sum payment from all agencies currently using hourly contracts to pay for their SOAH hearings.
- Eliminate the billing process for direct-funding agencies that exceed their predicted workload.

### **Issue 3 Maintaining an Administrative Hearings Function at the Texas Department of Licensing and Regulation Detracts from the State's Objective of Centralized, Independent Administrative Hearings.**

#### **Key Recommendation**

- Transfer the administrative hearings function at the Texas Department of Licensing and Regulation (TDLR) to the State Office of Administrative Hearings (SOAH).

### **Issue 4 SOAH Working Records May Be Too Accessible to the Public, While Proposals for Decisions and Final Orders Are Not Accessible Enough.**

#### **Key Recommendations**

- Create an exception in the Texas Public Information Act for SOAH judges' working notes and drafts of proposals for decisions and orders.
- The agency should post proposals for decision and final orders on its Web site.

## Fiscal Implication Summary

This report contains two issues that would have a fiscal impact resulting in an overall savings to the State. The chart below summarizes this impact.

- *Issue 1* – Requiring a third party review would have a one-time cost of \$20,000 to \$50,000. This cost should be more than offset by administrative efficiencies and savings resulting from the study.
- *Issue 2* – Replacing the use of the current funding contracts would decrease the amount of time that the agency dedicates to accounting for its billing, resulting in a reduction to the agency of one full time equivalent and a savings to the General Revenue Fund of \$50,000 per year.

<b>Fiscal Year</b>	<b>Savings to General Revenue</b>	<b>Change in FTEs From FY 2003</b>
2004	\$50,000	-1
2005	\$50,000	-1
2006	\$50,000	-1
2007	\$50,000	-1
2008	\$50,000	-1



## **ISSUES / RECOMMENDATIONS**

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# Issue 1

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## Texas Has a Continuing Need for an Independent Office of Administrative Hearings.

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### Summary

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#### Key Recommendations

- Continue the State Office of Administrative Hearings for 12 years.
- SOAH should take management actions to address certain administrative concerns.

#### Key Findings

- Maintaining the administrative hearings function at SOAH allows neutral parties to hear contested cases.
- To the general satisfaction of other state agencies, centralizing Texas' administrative hearings functions creates better economies for conducting hearings, and provides for better judges.
- Texas, along with other states, has endorsed the concept of a central, independent administrative hearings office.
- While SOAH's hearings are generally well received, internal management issues could affect future performance.

#### Conclusion

The State Office of Administrative Hearings offers quality, impartial hearings for Texas agencies. Created eleven years ago, the Office has successfully administered the centralization of the administrative hearings function. This centralization has accrued greater economies for the State, particularly with regard to the use of judges' time and the ability of ALJs to hear cases from multiple agencies. Despite the overall success at SOAH, Sunset staff found certain managerial issues, including administrative staffing levels and a hearings management structure, that could affect SOAH's future performance. In addition to recommending SOAH's continuation, the Sunset review found that SOAH should contract with a third party review for consultation with regard to the internal management issues found.

## Support

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**The mission of the State Office of Administrative Hearings is to conduct fair, objective, prompt, and efficient hearings and alternative dispute resolution proceedings for Texas state agencies.**

*SOAH conducts administrative hearings for more than 70 state agencies and other entities.*

- Created in 1991, SOAH serves as a quasi-judicial agency that conducts administrative law hearings as directed by state law. Unlike civil or criminal law trials, which take place at a court of law, administrative law hearings typically involve agencies' enforcement powers. Examples of the types of contested cases heard by SOAH include licensing and disciplinary cases involving regulated industries, utility rate setting, environmental permitting and enforcement, and eligibility requirements for insurance and disability benefits. Participants in SOAH hearings include Texas state agencies or other governmental entities, private citizens, and corporations doing business within the state.

SOAH conducts administrative hearings for more than 70 state agencies and other entities. The hearings are conducted by administrative law judges (ALJs) who take testimony, rule on questions of evidence, issue orders relating to discovery or other hearing or prehearing matters, and issue proposals for decision (PFDs) that include findings of fact and conclusions of law. With a few exceptions, proposals for decision are forwarded to a referring agency's board or commission for a final ruling.

- In 1993, the Legislature assigned SOAH the responsibility for conducting Administrative License Revocation (ALR) hearings for individuals charged with driving while intoxicated. These hearings are conducted at the agency's Austin office and, as required by state law, at the agency's eight field offices. Currently, the ALR program constitutes a significant portion of the agency's hearings: between 1998 and 2001, 27 percent of the time spent on hearings was dedicated to ALR.
- SOAH offers alternative dispute resolution (ADR) services to parties in contested cases or other disputes referred to SOAH. These services offer a less expensive, less contentious alternative to pursuing a case through the contested case hearing process. Agencies that have used SOAH's mediation services include the Texas Workers' Compensation Commission, Public Utility Commission, and the Texas Alcoholic and Beverage Commission. As part of its ADR function, SOAH provides arbitration services for nursing home enforcement cases brought by the Department of Human Services. Unlike mediation, arbitration includes a binding decision by the ALJ.

**Maintaining the administrative hearings function at SOAH allows neutral parties to hear contested cases.**

- Before SOAH’s creation in 1991, many agencies conducted their administrative law hearings in-house. This arrangement fostered the impression, particularly among appellants, that administrative law judges would be biased due to their employee status at the agency. In-house administrative law functions also increased the risk of inappropriate communications between the in-house hearings officer and the agency staff, as parties to that case. These perceptions eroded the claim that in-house hearings were fair and impartial.
- Maintaining administrative law judges at SOAH increases the ALJs’ independence from referring agencies. Unlike having ALJs at an agency, where they are both paid and housed by that agency, SOAH judges are members of a distinct, neutral hearings organization. The appearance of fair and impartial administrative law judges betters the appearance of Texas’ administrative hearings practices. More importantly, the maintenance of a neutral administrative hearings panel serves to better safeguard Texas citizens’ rights.

*Maintaining administrative law judges at SOAH increases the ALJ’s independence from referring agencies.*

**To the general satisfaction of other state agencies, centralizing Texas’ administrative hearings functions creates better economies for conducting hearings, and provides for better judges.**

- Consolidating hearings functions at SOAH lowers the number of ALJs needed to conduct hearings. The number of ALJs required for certain hearings after those functions have been transferred to SOAH demonstrates greater economies of scale through hearings consolidation. The chart, *ALJs Transferred to SOAH*, depicts that fewer ALJs are required for certain hearings when compared to those heard within certain agencies.

ALJs Transferred to SOAH		
Transferring Agency	Number of ALJs In-House, Before SOAH Transfer	Number of ALJs Required for Agency Hearings at SOAH in FY 2001
TABC	2	1.5
TDI	5	1.9
TNRCC	19	5.3
PUC	17.5	6.5

For example, before utilities hearings were transferred to SOAH in 1996, the Public Utility Commission maintained 17.5 ALJs in-house. In 2001, the utilities hearings workload amounted to 6.5 ALJ full time equivalents at SOAH, roughly 11 FTEs fewer than when at PUC. Although utilities cases were heard by the 17 ALJs of SOAH’s utilities team and other assigned judges, the economy of scale achieved in the use of their time allowed them to handle this workload more expeditiously, freeing them up to hear other cases. Further, as depicted in the chart, similar economies were achieved with the transfer of hearings functions from other agencies.

*Consolidating Texas' administrative hearings function at SOAH creates better economics of scale.*

*The majority of agencies surveyed rated SOAH's performance as either good or excellent.*

- Centralized hearing functions maximizes judges' use of time in processing cases. Hearings functions maintained at enforcement agencies are subject to agency enforcement schedules and regulated parties' appeals. Agencies must hire enough ALJs for peak case flow or allow more time to close cases due to scheduling constraints. This arrangement causes fluctuations in workloads for the ALJs in addition to periods of inactivity. In the extreme, it may also lead to ALJs being assigned non-hearings responsibilities within the agency that may interfere with their independence as judges. ALJs at SOAH, however, are subject to constant case flow due to referrals from several agencies, thereby reducing the amount of ALJs' downtime while increasing the rate at which cases are processed. Credit for SOAH's capacity to maximize judges' use of time goes to the agency's recently adopted hearings team structure.

Consolidating Texas' administrative hearings function at SOAH allows ALJs to hear a diverse array of cases. ALJs at other agencies are limited to the subject matter of their respective agencies. ALJs at SOAH, however, are exposed to a variety of cases. During the course of one week, a judge may hear ALR cases, in addition to ones from the Credit Union Department, Funeral Service Commission, and the State Board of Medical Examiners. This approach allows SOAH judges to gain exposure to and expertise in issues to help them develop more complete skills for conducting administrative hearings.

- Texas state agencies are generally favorable towards SOAH as the State's central hearings panel. According to a Sunset survey of agencies referring contested cases to SOAH, the majority of respondents prefer using SOAH over in-house or contracted-out hearings functions. In addition, the majority of respondents rated SOAH's performance as either good or excellent.<sup>1</sup>

**Texas, along with other states, has endorsed the concept of a central, independent administrative hearings office.**

- When SOAH began holding hearings in 1992, its jurisdiction was limited to those agencies that did not employ their own administrative law judges. These agencies were typically small and regulatory in nature. Before these agencies had their hearings assigned to SOAH, their boards or commissions performed their administrative hearings function, or they contracted with private attorneys to serve as hearings officers.
- The Legislature has transferred 17 hearings functions to SOAH since the Office's creation in 1991. The text box, *Hearings Transfers to SOAH*, lists the hearings functions transferred to SOAH since its inception. Most of these hearings functions were transferred in their entirety. A few agencies, however, such as the Public Utility

Commission, Railroad Commission, and the Department of Human Services, were able to retain administrative law judges for other purposes. Some agencies, such as the Finance Commission, Texas Department of Licensing and Regulation, and the Comptroller's Office, still retain separate administrative hearings functions.

- Twenty-five other states have central hearings panels similar to SOAH. Some states, such as Arizona, Louisiana, Maryland, Washington, South Carolina and New Jersey maintain independent offices for administrative hearings. Other states maintain hearings panels as part of other agencies. For example, the California Office of Administrative Hearings serves as a part of the state's Department of General Services. The Administrative Procedures Division for the State of Tennessee resides in its Secretary of State's Office, while Iowa's Administrative Hearings Division serves as a part of the Iowa Department of Inspection and Appeals.

<b>Hearings Transfers to SOAH</b>		
<b>73rd Session, 1993</b>		
Texas Alcoholic Beverage Commission		
Texas Department of Insurance		
Department of Public Safety Administrative License Revocation Program		
Board of Examiners of Perfusionists		
Board of Professional Counselors		
State Board of Marriage and Family Therapists		
<b>74th Session, 1995</b>		
Texas Natural Resource Conservation Commission		
Public Utility Commission of Texas		
State Library and Archives Commission		
Department of Agriculture		
<b>75th Session, 1997</b>		
Department of Protective and Regulatory Services		
<b>76th Session, 1999</b>		
Department of Health		
Department of Human Services		
Texas Commission on Private Security		
<b>77th Session, 2001</b>		
Gas Utilities Division, Railroad Commission		
Edwards Aquifer Authority		

**While SOAH's hearings are generally well received, internal managerial issues could affect future performance.**

- SOAH currently has 118 FTEs out of a budgeted maximum of 122. Of these employees, 59 are administrative law judges, while the remaining 58 employees serve in managerial and administrative positions. Given the straightforward nature of SOAH's mission and function, the level of non-hearings staffing at the agency is significant. Specifically, staffing levels in certain administrative offices, particularly special projects, human resources, information resources, and accounting may be overextended. For fiscal year 2002, SOAH has budgeted four FTEs in human resources, five in information resources, six in accounting, and 1.5 FTEs in special projects. Other agencies sometimes require fewer FTEs to achieve similar functions. For example, the State Bar of Texas, which employs nearly 300 FTEs to administer both the promotional and disciplinary functions associated with the legal profession, maintains four FTEs in its human resources division, twelve in its accounting division, and six in its information technology division. The table, *Comparison of Staffing Ratios at SOAH vs. State Bar*, shows that the State Bar relies on proportionally fewer FTEs to accomplish similar tasks when compared to SOAH.

<b>Comparison of Staffing Ratios at SOAH vs. State Bar</b>		
<b>Function</b>	<b>SOAH</b>	<b>State Bar</b>
HR	3.3%	1.4%
IR	4.1%	2.0%
Accounting	4.9%	4.0%

- SOAH's hearings management structure consists of the Chief Administrative Law Judge, one Hearings Director, two Assistants to the Hearings Director, and seven team leaders, as depicted in the chart, *SOAH Hearings Management*. The four levels of managerial oversight over the line administrative law judges reflects a chain of command that may be too hierarchical given the straightforward mission of the agency.

#### **SOAH Hearings Management**

Chief ALJ (1)  
Hearings Director (1)  
Assistants to the Hearings  
Director (2)  
Team Leader (7)  
Line ALJs (48)

Unlike line staff in other executive agencies, ALJs at SOAH are required to exhibit a significant amount of independence. This requirement is exhibited in statute, and listed in the job description requiring ALJs to demonstrate a “wide latitude for initiative and exercising independent judgment.”<sup>2</sup> To maintain this independence, the agency’s hearings management gives little, if any, material direction to the judges’ presiding over cases and provides minimal quality control with the production of agency orders. While the team structure has paid dividends in developing and efficiently using judges in hearings, given the functional independence that they exhibit, the use of eleven managerial positions to oversee line ALJs may be more than is necessary.

## **Recommendation**

### **Change in Statute**

#### **1.1 Continue the State Office of Administrative Hearings for 12 years.**

This recommendation would continue SOAH as an independent agency responsible for conducting independent administrative hearings for certain state agencies. Under this recommendation, SOAH is subject to Sunset review again in 2015. As is currently the case, the agency will be subject to review but not automatic termination.

### **Management Action**

#### **1.2 The State Office of Administrative Hearings should contract for a third party review of certain staffing levels and workloads, and to assess the agency’s hearings management structure.**

This management action would require SOAH to contract with an independent third party to review the agency’s non-hearings staff functions and duties. The review should focus on the function and staffing levels of the agency’s information resources, human resources, fiscal department, and special projects divisions and measure how well these functions support the agency’s mission. This recommendation would also require an examination of SOAH’s hearings management structure.

This review should focus on determining if the current structure is appropriate and how well it supports the agency's mission and how well the current structure provides for quality control.

## **Impact**

Continuing the State Office of Administrative Hearings for 12 years would extend the State's policy for maintaining a neutral administrative hearings panel. The management action recommendation regarding SOAH's management structure and practices, and non-hearings staff levels, should promote a management approach within the organization that allows it to continue providing quality hearing service for state agencies.

## **Fiscal Implication**

These recommendations will have a fiscal impact to the State. The management action regarding a third party review would result in a one-time cost to SOAH. The study would cost SOAH \$20,000 to \$50,000, which should be more than offset by administrative efficiencies and savings resulting from the study.

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<sup>1</sup> Sunset Commission Staff, State Office of Administrative Hearings Survey, June-July 2002. See Appendix F for details on survey responses.

<sup>2</sup> SOAH's statute states that one of the duties of the Chief Administrative Law Judge is to "protect and ensure the *decisional independence* of each administrative law judge" (emphasis added). Texas Government Code, ch. 2003, sec. 2003.022(d)(2); State Office of Administrative Hearings Judge I, Lead ALJ job description.



## Issue 2

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### **The Current Billing Process for Hearings Causes Problems for Both the Referring Agencies and SOAH.**

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## Summary

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### **Key Recommendations**

- Require that the State Office of Administrative Hearings (SOAH) receive a lump sum payment from all agencies currently using hourly contracts to pay for their SOAH hearings.
- Eliminate the billing process for direct-funding agencies that exceed their predicted workload.

### **Key Findings**

- SOAH receives a diminishing portion of its funding through interagency funding arrangements.
- Conducting contested case hearings based on agencies' ability to pay can affect their enforcement efforts.
- Funding SOAH operations by billing agencies may cause problems for SOAH.
- The Legislature has sought to provide more direct funding to SOAH, just as other states have done for their administrative hearing offices.

### **Conclusion**

Several state agencies pay the cost of conducting administrative hearings through interagency contracts with SOAH, based on an hourly charge for hearings time required. Other agencies have their hearings costs covered by a direct General Revenue appropriation to SOAH, but are billed individually for usage that exceeds predicted workload.

Linking an agency's decision to go to a hearing with its available funding may make the agency reluctant to refer cases to SOAH, which may harm the performance of the agency's mission. This relationship between hearings and funding can also contribute to an appearance that SOAH favors agencies based on their ability to pay, and ultimately threatens the fairness that SOAH was established to provide. It also presents a cumbersome, time-consuming process that impairs SOAH's ability to efficiently process these hearings.

The Sunset review sought to maintain the accountability of the current user-pay funding system while providing greater transparency to the referring agencies and to SOAH in the actual funding arrangement. The recommendations to provide more direct funding to SOAH would ensure greater certainty in its funding levels, and would allow the referring agencies and SOAH to focus more on the hearings themselves, and less on funding concerns.

## Support

### The State Office of Administrative Hearings receives a diminishing portion of its funding through interagency funding arrangements.

*SOAH budgeted 19 percent of its revenue through interagency funding arrangements for FY 2002.*

- SOAH budgeted \$8.7 million in revenue for fiscal year 2002, receiving 75 percent of its funding through direct appropriation, mainly from General Revenue or the State Highway Fund; 6 percent through other sources; and 19 percent of its revenue through interagency funding arrangements. The latter form of SOAH's funding, interagency funding arrangements, involves agencies paying SOAH for hearings conducted.
- Agencies typically use one of three types of interagency arrangements to pay SOAH for hearings conducted, as shown in the table, *Types of Interagency Funding Arrangements*. In the lump sum contract, the agency pays SOAH a set amount each year for hearing its contested cases. The second type of arrangement involves the billing of agencies at the rate of \$90 per case hour. The third type of funding arrangement involves agencies for which SOAH receives a direct General Revenue appropriation for a set number of contested case hours. If an agency's contested cases take more than their allotted time, it is billed at \$90 per hour for the excess hours used.

Types of Interagency Funding Arrangements		
Arrangement Type	Examples of Agencies	Amount of Revenue (FY 2002)
Lump Sum	TNRCC only	\$938,000
Excess Hours	TDI, TxDOT, TDHCA, ERS	\$50,000
Hourly	HHSC, TDHS, SBEC, GLO	\$557,000

*Historically, the Legislature has reduced the extent to which SOAH has had to rely on interagency contracts for funding.*

- Historically, the Legislature has worked to reduce the extent to which SOAH has had to rely on interagency funding arrangements for funding. When the agency was created in 1991, the Legislature approved an initial appropriation of \$100,000 to SOAH along with a rider to require agencies to pay for their own hearings. In 1997, the Legislature appropriated \$1,035,500 in General Revenue to the agency to cover the costs of certain hearings. Over the next four years, SOAH received increased General Revenue appropriations from the Legislature to cover the hearings costs for 23 small licensing agencies.

**Conducting contested case hearings based on agencies' ability to pay can affect their enforcement efforts.**

- Some agencies have spent more funds than they have budgeted for SOAH hearings. According to Sunset staff's survey of agencies referring contested case hearings to SOAH, state agencies have spent anywhere between \$1,900 to \$55,000 more than the amount that they had budgeted for SOAH hearings during the past two fiscal years. In fact, the Texas Workers' Compensation Commission anticipates spending \$200,000 over budget for SOAH hearings in FY 2002. These excess costs for SOAH hearings force agencies to reduce funds allocated for other program areas to pay for their hearings bills, possibly harming program and enforcement activities in other areas.
- Some agencies may be reluctant to refer contested cases to SOAH because of the potential budgetary impact that they feel they do not control. Any decision not to refer a case to SOAH because of a lack of funding may have an adverse effect on the regulatory efforts of state agencies. Their interest in controlling hearing costs may lead them to settle cases with a lesser sanction instead of pursuing more stringent enforcement through a contested case at SOAH, ultimately affecting the agency's performance in meeting its regulatory mission.
- Texas state agencies have delayed referring cases to SOAH because of budgetary concerns. Seven agencies reported in a Sunset survey that they have delayed referring cases to SOAH due to a lack of funds. One agency reported, "[w]e presently have three cases that are waiting for money to allow us to have SOAH hearings."<sup>1</sup> Delays in the referral of cases to SOAH slow the execution of due process of law while hindering an agency's enforcement capabilities. Parties to a contested case that an agency delays must wait longer to hear the verdict on their case. In addition, agencies must delay their own enforcement, sometimes allowing individuals or entities found with a violation to continue operating without sanction.

*Texas state agencies have delayed referring cases to SOAH because of budgetary concerns.*

**Funding SOAH operations by billing agencies may cause problems for SOAH.**

- The billing relationship between SOAH and certain agencies creates the potential for the appearance that SOAH may favor agencies based on their ability to pay. At its extreme, the agencies' purse strings may be perceived to exert control over SOAH and its ALJs. But, even the perception that SOAH conducts hearings based on agencies' ability to pay, and that agencies may be reluctant to refer cases to SOAH for that same reason, diminishes the ultimate fairness that SOAH was established to provide.

*SOAH's current billing system adds to the agency's overall costs.*

- SOAH maintains an internal billing system to account for the amount of time that its ALJs spend on cases. This system requires SOAH judges to account for their time and for SOAH's accounting staff to compile the information and prepare periodic invoices for the agencies. This current billing regimen requires a significant amount of staff time recording, tracking, and billing ALJs' hours, which ultimately adds to SOAH's overall costs.
- The billing process affects SOAH's cash flow. Because SOAH must account for many agencies' use individually and bill them accordingly, it cannot easily aggregate funds to allow it to make up for minor excess workload by some agencies with underused capacity by others. In addition, because SOAH must return unexpended funds to the Treasury at the end of each fiscal year, it may have insufficient time to expend funds earned for services rendered when agencies pay for their hearings near the end of the fiscal year. In fiscal year 2001, SOAH lapsed \$235,000 to the Treasury, and lapsed \$157,000 in fiscal year 2000. The agency's loss of these funds has affected its internal operations, particularly with regard to the distribution of raises and bonuses.

**The Legislature has sought to provide more direct funding to SOAH, just as other states have done for their administrative hearing offices.**

*The Legislature has moved away from interagency contracts, steadily providing SOAH with more direct funding.*

- Since SOAH's creation when it was almost fully funded through interagency contracts, the Legislature has steadily provided it with more direct funding. In 1997, the Legislature appropriated \$1 million in General Revenue to SOAH. In 1999, it increased that General Revenue appropriation to pay for hearings costs for certain agencies, with a provision that those agencies would pay for costs of excess workload ten percent above a specified cap established for each agency. These efforts reached a milestone last session, when the Legislature added a provision to fully fund SOAH's cost for 23 smaller occupational licensing agencies. Currently, only 14 agencies, representing just 6.4 percent of SOAH's revenues, must pay their hearings costs through interagency contracts based on hourly use.
- At least two states with state administrative hearings offices, Florida and Maryland, provide for direct funding for all state agency contested cases. In each state, the Legislature appropriates funds directly to the hearings office, based on the budgets of previous years, adjusted for expected changes in caseload for the upcoming year. The appropriation is made through a line-item charge to each agency based on the agency's share of total case hours for the most recent year.<sup>2</sup> In Maryland, the hearings office switched to the current system from an hourly billing system in 1991 after some

agencies ran out of appropriated funds and stopped referring cases for hearings before the end of the fiscal year.<sup>3</sup>

## Recommendation

### Change in Agency Appropriation

#### 2.1 Require that the State Office of Administrative Hearings receive a lump sum payment from all agencies currently using hourly contracts to pay for their SOAH hearing.

This recommendation would require those agencies that currently pay for their SOAH hearings through an hourly contract to pay SOAH a lump sum at the start of each fiscal year, based on the agency's average costs over the previous three years. These hourly contract agencies and their average hearing costs for FY 1999 – 2001 are shown in the accompanying table.

SOAH would calculate the amount of casework required for each agency for the preceding three years, which would provide the basis for that agency's payment to SOAH in the next biennium. SOAH would provide this information to the Legislature, as part of its appropriations request. SOAH would be authorized to spend the funds, and the respective agencies would be directed by rider to transfer the amounts, at the beginning of each fiscal year of the upcoming biennium. Agencies with hearings functions recently transferred to SOAH, such as the Railroad Commission's gas utilities division, would be assessed on the basis of the level of hearings held in-house before the function was transferred.

SOAH would use the funds received to pay overall hearings costs for these agencies, without regard to the level of usage of individual agencies. In other words, SOAH would address whatever the hearing needs of these agencies may be, without imposing a cap on their usage. At the same time, SOAH would be able to keep any excess funds from agencies not meeting their anticipated level of hearings use. As a result, SOAH would not need to separately bill for each agency's hearings use within the year.

Agencies Affected by Recommendation 2.1	
Agency	Average Amount Billed FY 1999 - 2001
Attorney General	\$150
General Land Office	\$19,083
Department of Human Services	\$193,583
Ethics Commission	\$1,643
Department of Public Safety (transcripts only)	\$1,172
Commission on Private Security	\$11,628
Railroad Commission	N/A
Department of Health	\$18,370
Soil and Water Conservation Board	N/A
Health and Human Services Commission	\$0
Texas Youth Commission	\$175
Board of Educator Certification	\$48,777
Department of Protective and Regulatory Services	\$162,992
Animal Health Commission	\$7

This recommendation would keep agencies accountable for their hearings use by having their current level of usage provide the basis for their future hearings payments. SOAH calculation of each agency's use at the end of each fiscal year would help ensure that the next fiscal years' charge reflects actual usage. In addition, SOAH would be responsible for forecasting overall usage within the year to ensure that it has adequate funding to cover needs. SOAH would be able to seek funding, such as a deficiency grant from the Governor's Office, to cover any shortfall. SOAH would have to repay any such funds at the beginning of the next biennium, through authorization to collect an additional charge from the agencies that contributed to the shortfall by exceeding their predicted workload.

This recommendation would not affect the non-state entities or voluntary requests for SOAH hearings currently using hourly contracts for SOAH hearings.

## **2.2 Eliminate the billing process for direct-funded agencies that exceed their predicted workload.**

This recommendation would slightly change the funding process for agencies that only pay hearings costs above an established hourly cap. These agencies, whose hearings costs are already directly funded by General Revenue appropriation, would continue to be direct-funded. These agencies are identified in the table, *Agencies Affected by Recommendation 2.2*. However, the process for billing these agencies for their excess hearings workload at SOAH would be eliminated. Agencies would have their hearings conducted without regard to a cap, but SOAH would continue to calculate each agency's usage at the end of the fiscal year to help ensure that its General Revenue appropriation reflects actual usage. Agencies that exceed their predicted usage by the ten percent allowance currently specified in the Appropriations Act would be subject to a future transfer of money to SOAH. As discussed in Recommendation 2.1, SOAH would add the amount to the agency's assessment for the next biennium, based on approval through the appropriations process.

## **Impact**

These recommendations would effectively abolish the billing system currently used at SOAH, and would instead provide a sum certain to SOAH at the beginning of each fiscal year. This funding method would provide a greater level of funding certainty to both the referring agencies and to SOAH, enabling hearings to be conducted without the concern of each individual agency's ability to pay. As a result, these recommendations should remove some of the current disincentives for agencies to refer cases to SOAH, and also strengthen the appearance of SOAH's impartial role in conducting hearings. These recommendations would also increase the likelihood of agencies pursuing cases at SOAH based on their merits and not on funding considerations.

In addition, by receiving funds at the beginning of the fiscal year, SOAH would be better able to cover its general hearings costs without lapsing funds at the end of the fiscal year. This would improve SOAH's efficiency in using available funds for their intended use. It also makes SOAH's overall task simpler so it can focus more on conducting hearings and less on accounting.

Finally, these recommendations do not pertain to the funding for agencies with hearings that are fully funded by General Revenue, nor the current funding arrangements for the Texas Natural Resource Conservation Commission and the use of the State Highway Fund.

<b>Agencies Affected by Recommendation 2.2</b>	
<b>Agency</b>	<b>Hourly Cap</b>
Secretary of State	44
State Securities Board	665
Commission for the Blind	34
Workforce Commission	31
Teacher Retirement System	122
Firefighters' Pension Commissioner	0
Employees Retirement System	2,473
Real Estate Commission	7
Department of Housing and Community Affairs	415
Department on Aging	0
Commission on Human Rights	0
Lottery Commission	708
Department of Public Safety	239
Commission on Law Enforcement Officer Standards and Education	321
Commission on Fire Protection	2
Workers Compensation Commission	4,935
Department of Insurance	4,539
Texas Parks and Wildlife Department	48
Board of Plumbing Examiners	8
Higher Education Coordinating Board	1

<b>Agencies Affected by Recommendation 2.2</b>	
<b>Agency</b>	<b>Hourly Cap</b>
Texas Alcoholic Beverage Commission	2,320
Board of Registration for Professional Engineers	28
Board of Professional Land Surveying	73
Credit Union Department	36
Structural Pest Control Board	56
Racing Commission	46
Department of Health	618
Board of Medical Examiners	897
Board of Dental Examiners	181
Board of Vocational Nurse Examiners	332
Funeral Services Commission	7
Board of Pharmacy	103
Commission on Alcohol and Drug Abuse	343
Board of Examiners of Psychologists	141
Executive Council of Physical and Occupational Therapist Examiners	0
Department of Agriculture	184
Board of Veterinary Medical Examiners	48
Department of Transportation	497

## Fiscal Implication

In addition to improving SOAH's cash flow, these recommendations would have a positive fiscal impact to the State of Texas. Replacing the use of the current funding contracts would decrease the amount of time that the agency dedicates to accounting for its billing, resulting in a reduction to the agency of one full time equivalent and a savings to the General Revenue Fund of \$50,000 per year.

<b>Fiscal Year</b>	<b>Savings to General Revenue</b>	<b>Change in FTEs From FY 2003</b>
2004	\$50,000	-1
2005	\$50,000	-1
2006	\$50,000	-1
2007	\$50,000	-1
2008	\$50,000	-1

<sup>1</sup> Agency response, Sunset Survey of Texas State Agencies Regarding SOAH, June-July 2002.

<sup>2</sup> Interview with Marilyn Lawrence, Director of Finance, Florida Division of Administrative Hearings, August 1, 2002.

<sup>3</sup> Interview with Benjamin Rudo, Director of Management and Administration, Maryland Office of Administrative Hearings, August 2, 2002.

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## Issue 3

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### **Maintaining an Administrative Hearings Function at the Texas Department of Licensing and Regulation Detracts from the State's Objective of Centralized, Independent Administrative Hearings.**

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## Summary

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### **Key Recommendations**

- Transfer the administrative hearings function at the Texas Department of Licensing and Regulation (TDLR) to the State Office of Administrative Hearings (SOAH).

### **Key Findings**

- Sunset staff postponed its evaluation of the administrative hearings function at TDLR pending the outcome of its review of SOAH.
- Conducting administrative hearings in-house at TDLR cannot ensure the level of independence that SOAH can.
- SOAH has the expertise to conduct quality administrative hearings, and can conduct administrative hearings as efficiently as TDLR.

### **Conclusion**

The Texas Department of Licensing and Regulation, one of the state's umbrella licensing agencies, is also one of the last state agencies that conducts its own administrative hearings. The Sunset staff had identified the hearings activity at TDLR for possible consolidation as part of its earlier review of that agency, but deferred the issue until the review of SOAH to ensure SOAH's readiness and ability to assume the responsibility.

The review considered independence, quality, and cost of hearings at both locations. While the earlier review of TDLR concluded that the agency may be ready to expand its role as an umbrella agency, the hearings function does not fit with that mission. Transferring this function to SOAH would ensure a level of independence that TDLR cannot, and would not harm the quality of hearings or TDLR's overall performance. TDLR is no different from the 70 other state agencies that have benefitted by having their hearings conducted at SOAH.

## Support

### The Texas Department of Licensing and Regulation conducts its own administrative hearings.

*TDLR held 212 hearings for nine of its 20 programs in FY 2001.*

- The Texas Department of Licensing and Regulation (TDLR) is one of the state's umbrella occupational licensing agencies, administering 20 different licensing programs. It is also one of the last state agencies that still conducts contested case hearings with its own administrative law judge (ALJ). TDLR has one full-time ALJ and one full-time administrative support person to conduct hearings, with fiscal year 2001 expenditures of \$122,362.
- In fiscal year 2001, TDLR held 212 administrative hearings, consisting of 1,819 total case hours in nine of the 20 programs administered by the agency. The table, *Administrative Hearings Conducted by TDLR, FY 2001*, shows the distribution of these hearings. More than half of the cases involved actions on licenses for air conditioning and refrigeration contractors, while almost another quarter involved career counseling or water well drilling.

Administrative Hearings Conducted by TDLR, FY 2001		
Program	Number of Hearings Held	Percent of Total
Air Conditioning and Refrigeration	123	58%
Career Counseling	24	11%
Water Well Drillers	24	11%
Auctioneers	15	7%
Boilers	10	5%
Architectural Barriers	7	3%
Talent Agencies	4	2%
Elevators	3	1%
Combative Sports	2	1%
<b>Total</b>	<b>212</b>	<b>100%</b>

### Sunset staff postponed its evaluation of the administrative hearings function at TDLR pending the outcome of its review of SOAH.

- Dating back to the creation of the State Office of Administrative Hearings (SOAH), the Sunset Commission has routinely reviewed administrative hearings conducted by agencies to determine

whether this function could be better performed by SOAH. The Sunset Commission played a role in implementing a provision of SOAH's enabling legislation requiring an evaluation of independence, quality, and cost at agencies with their own hearings staff to determine if the hearings functions should be transferred.

- The Sunset review of TDLR, which concluded with a staff report published in February 2002, recognized the Legislature's growing confidence in the agency as an indicator of its readiness to expand its role as an umbrella licensing agency. However, the review also recognized the separateness of the question about TDLR's hearings function, delaying the recommendation about the appropriate location of those hearings until it could ensure that SOAH was capable of assuming additional responsibilities.

**Conducting administrative hearings in-house at TDLR cannot ensure the level of independence that SOAH can.**

- The majority of the participants in TDLR regulatory hearings — the ALJ, the attorneys, and the staff that investigates and brings the charge of a regulatory violation — are all employed by TDLR. This relationship provides the opportunity for ex parte communication and may create the perception that the hearings process and the ALJ's decision are not independent and fair.
- The perceived lack of independence would not exist if administrative hearings were conducted by an ALJ employed by SOAH. The ALJs assigned to perform hearings for TDLR would be housed with SOAH, separating TDLR's role as a party in the hearings from the responsibility to conduct the hearing.
- In a survey of agencies that have their hearings conducted by SOAH, many noted that the confidence of contested case parties in the administrative hearing process is improved when hearings are held by judges at an independent agency. Nearly three quarters of survey respondents have characterized SOAH judges as "excellent" or "good" at providing fair and impartial hearings.

**SOAH has the expertise to conduct quality administrative hearings.**

- In fiscal year 2001, SOAH handled 21,548 cases for 50 state agencies and local political subdivisions, consisting of over 62,000 total case hours. SOAH judges have the demonstrated ability to conduct hearings with both the subject matter expertise and procedural skills required to preside over different kinds of cases.
- SOAH already conducts hearings concerning a greater range of issues having more complexity than TDLR hearings. SOAH hears contested cases for almost all of the professions licensed by the state, including doctors, nurses, psychologists, engineers, land

*Maintaining hearings at TDLR provides the opportunity for ex parte communication and may create the perception that hearings are not fair.*

surveyors, plumbers, barbers, and cosmetologists. SOAH also hears cases for several additional regulatory programs within the other umbrella licensing agencies, the Texas Department of Health (TDH) and the Texas Natural Resource Conservation Commission (TNRCC). Also, like TDLR, SOAH hears many cases for a variety of regulated businesses or entities, including nursing homes, manufactured housing companies, road construction contractors, and water service corporations. Finally, SOAH has shown its ability to conduct complex hearings through its work on electric and telecommunications utilities for the Public Utility Commission and hearings on environmental regulations for TNRCC.

*The cost per hearings case hour at TDLR is \$67, compared to \$59 at SOAH.*

- The Legislature has recognized SOAH's expertise and continues to give it additional hearings authority. Since 1993 the Legislature has transferred 19 administrative hearings functions to SOAH, including contested cases for all of TDH's regulatory programs in 1999, and responsibility to hear gas utility cases from the Railroad Commission in 2001. In addition, 11 agencies and political subdivisions have transferred their administrative hearings to SOAH through voluntary contracts.<sup>1</sup>

**SOAH can conduct administrative hearings as efficiently as TDLR.**

*TDLR cases are no more complex or time consuming than the average SOAH case.*

- TDLR spent \$122,362 on administrative hearings in fiscal year 2001, for an average cost of \$67 per case hour. SOAH estimates that it would need \$107,787 to fulfill this function, for an average cost of \$59 per case hour based on the TDLR workload for fiscal year 2001.<sup>2</sup>
- TDLR cases are no more complex or time consuming than the average SOAH case. The TDLR hearings examiner spent an average of 8.6 hours working on each case in fiscal year 2001. This is roughly equivalent to the average SOAH rate of 8 hours per case.<sup>3</sup> In addition, SOAH's performance in disposing of cases and preparing proposals for decision would not adversely affect TDLR's time lines in processing its enforcement cases.
- TDLR's case hours would increase SOAH's workload by 3 percent, which is a reasonable and manageable increase based on workload increases in previous years. Since 1996, SOAH case workloads have increased by an average of 23 percent each year.<sup>4</sup>

## Recommendation

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### Change in Statute

#### **3.1 Transfer the administrative hearings function at the Texas Department of Licensing and Regulation to the State Office of Administrative Hearings.**

In conducting hearings, SOAH would consider the Board's applicable substantive rules or policies. In this way, the agency would still determine how broader policy matters or recurring issues would be treated by administrative law judges. Like other agencies that have hearings conducted by SOAH, the TDLR Commission would maintain final authority to accept, reverse, or modify a proposal for decision made by a SOAH judge. The Commission may reverse or modify the decision only if the judge did not properly apply or interpret applicable law, agency rules, written policies, or prior administrative decisions; the judge relied on a prior administrative decision that is incorrect or should be changed; or the Commission finds a technical error in a finding of fact that should be changed. The agency must state in writing the specific reason and legal basis for a change.

SOAH should work with TDLR to ensure a smooth transition of the administrative hearing function, including a basic training session for SOAH judges by TDLR staff on the agency's programs. The transition would involve the transfer of two full-time equivalent (FTE) positions from TDLR to SOAH. To fill the FTE positions, SOAH should give first consideration to applicants employed as a hearings examiner or administrative technician at TDLR. Although SOAH may face an initial learning curve in hearing cases about TDLR regulated industries, the subject areas of TDLR cases are not significantly more complex than the average cases currently brought before SOAH. Within a reasonable period of time, SOAH should develop the equivalent expertise in the issues that currently exists at TDLR.

### Impact

This recommendation would ensure that administrative hearings related to TDLR are treated the same way as hearings for 70 other state agencies. These hearings would benefit from having an independent judge, not connected with the agency bringing the action, serve as the fact finder making the recommendation for action.

As evidenced by the vast array of issues that SOAH judges must already deal with, SOAH would be able to provide the needed expertise to conduct hearings in each of TDLR's 20 licensing programs. It would also be able to conduct these hearings at a cost that is comparable to TDLR's without harming TDLR's time frames or performance in its enforcement program.

### Fiscal Implication

This recommendation would not have a fiscal impact to the State. Moving the TDLR administrative hearings function to SOAH would involve the transfer of two FTE positions from TDLR to SOAH and may provide a small net savings due to the potential for greater efficiency at SOAH.

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<sup>1</sup> SOAH, *Self Evaluation Report*, pp. 33-42.

<sup>2</sup> Based on information in memoranda from Brian Francis, TDLR, to Karl Spock, Sunset staff, March 7, 2002, and from Paul Elliot, SOAH, to Karl Spock, Sunset staff, April 12, 2002. The cost of administrative hearings at TDLR includes the salaries and indirect costs (28.59 percent) for one full time hearings examiner and one full time administrative support person, plus a pro-rated share of supplies and other overhead costs. The estimated costs to SOAH include salaries, indirect costs and pro-rated overhead costs for a Judge I position and an Administrative Technician II position, the equivalent positions SOAH believes it would need to assume the administrative hearings function of TDLR.

<sup>3</sup> The SOAH average does not include utilities cases, which at 86 hours per case are atypically complex, nor does it include Administrative License Revocation cases, which at 1.3 hours per case are atypically simple.

<sup>4</sup> SOAH, *Workload Analysis: Hours Worked FY 1996 to FY 2001* (spreadsheet).

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## Issue 4

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### **SOAH Working Records May Be Too Accessible to the Public, While Proposals for Decisions and Final Orders Are Not Accessible Enough.**

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## Summary

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### **Key Recommendations**

- Create an exception in the Texas Public Information Act for SOAH judges' working notes and drafts of proposals for decisions and orders.
- The agency should post proposals for decision and final orders on its Web site.

### **Key Findings**

- The Texas Public Information Act does not have an explicit exception for SOAH judges' working notes and drafts of proposals for decisions and orders.
- Disclosure of ALJ working notes and drafts of proposals for decisions and orders could harm ALJ deliberations and reduce hearings efficiency.
- Entities with comparable functions to SOAH are not subject to disclosure of their working papers and draft documents.
- While the disclosure of working papers and draft documents may adversely affect hearings, SOAH could do more to make its proposals for decision and final orders accessible to the public.

### **Conclusion**

The working notes and drafts of proposals for decisions and orders of administrative law judges at the State Office of Administrative Hearings are not exempted from public disclosure under the Texas Public Information Act. Disclosure of these materials could potentially harm judges' deliberations while reducing the agency's capacity to conduct hearings. Given these problems, Sunset staff found cause to recommend that ALJs' working notes and drafts of proposals for decisions and orders be exempted from public disclosure under the Public Information Act. Sunset staff also recognized an opportunity to provide the public with better access to SOAH's proposals for decision and final orders by posting such documents on the agency's Web site.

## Support

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### **SOAH administrative law judges perform quasi-judicial functions in an executive agency.**

- SOAH's purpose is to conduct contested case hearings for the executive branch of state government. As such, it functions as an administrative judiciary, but not within the judicial branch of government.
- SOAH hearings involve a range of subjects, from utility rates and environmental matters to medical questions and economic issues. In the course of these hearings, SOAH judges must be able to sort through vast amounts of information in the form of boxes of evidence and days of hearings full of witness testimony. In many cases ALJs must be able to understand complex, technical issues to render their decisions.
- SOAH judges typically take extensive notes regarding the evidence and testimony of witnesses, including their evaluations of the weight and relevance of the testimony, credibility of the witnesses, and the relative merits of the parties' arguments. This kind of note-taking is necessary for processing large amounts of information, especially when the information on the record must serve as the basis for findings and conclusions.
- The hearings process requires judges to prepare numerous documents that relate to processing of cases. For example, judges prepare and issue orders that include setting the hearing schedule, clarifying the hearing's scope, or setting the requirements for party status. ALJs may also consolidate dockets, sever issues, or send certified questions to the referring agency seeking guidance regarding technical issues. Finally, in most cases judges prepare proposals for decisions for cases, summarizing the key facts and applying the law to those facts to draw conclusions leading to final action on the case. In a few instances, however, SOAH's administrative law judges issue final orders that are binding in nature.

*SOAH judges typically take extensive notes regarding the evidence and testimony of witnesses.*

Preparing these documents may require numerous drafts for judges to be satisfied that the material clearly and accurately reflects their thoughts. In this way, the drafting process itself is integral to the evolution of thought necessary to express the ALJ's intentions and decisions.

**The Texas Public Information Act does not have an explicit exception for SOAH judges' working notes and drafts of proposals for decisions and orders.**

- The Texas Public Information Act (the Act) requires Texas state agencies to provide information to the public upon request. The Act was created to keep citizens of Texas informed of the actions and operations of state agencies, with certain specified exceptions in statute. As a governmental body not specifically exempt from the Act, the status of working notes and drafts of proposals for decisions and orders would appear to be subject to disclosure. However, by listing final opinions and orders in the adjudication of cases as an example of information subject to disclosure, the Act seems to imply that non-final working notes and drafts of proposals for decisions and orders would be exempted.
- Since 1999, SOAH has received three open records requests for ALJ working notes and drafts of proposals for decisions and has responded to the first two requests. The agency solicited an Attorney General Opinion for the third because of the significance of the case and potential harm to the ALJ deliberative process and the effect on hearing efficiency related to responding. The request was for information relating to what is probably the largest case to come before SOAH, hearing on the application of the Texas Low-Level Radioactive Waste Disposal Authority to build and operate a disposal facility in Texas. SOAH is concerned that releasing such information related to a high profile case may lead to a greater number of similar information requests in the future.

*Since 1999, SOAH has received three open records requests for ALJ working notes and drafts of proposals for decisions.*

**Disclosure of ALJ working notes and drafts of proposals for decisions and orders could harm ALJ deliberations and reduce hearings efficiency.**

- Granting the public access to a judge's personal hearing notes would intrude upon the jurist's subjective thoughts and impressions about the evidence and testimony in a case. If this information were released and used to question the reasoning or final decision of the ALJ, the judge may be less likely to maintain this information in the future. To the extent this occurs, it would likely impair the judge's ability to process the information, deliberate, and reach sound conclusions.
- Disclosing draft orders, decisions, and other draft documents under the Public Information Act could be confusing and even misleading to the public and outweigh any public benefit. During the drafting process the writer places raw thoughts to paper so they can be refined and corrected. Similar to the release of working papers, releasing these drafts could stifle the creative, formative process by which judges make decisions. As noted in SOAH's request for

*Granting the public access to a judge's personal hearing notes would intrude upon the jurist's subjective thoughts and impressions about a case.*

*The efficiency of the SOAH hearings process could suffer if judges were inhibited from maintaining working notes and drafts of PFDs.*

opinion to the Attorney General, parties to cases and others may seek to use these notes and drafts to go behind the final decision or order to see the unrefined product that may be tentative or wrong.<sup>1</sup> These drafts and notes are not part of the hearing record, and do not constitute an action by SOAH. Sunset staff concluded that these notes and drafts would not serve to benefit the public enough to justify release.

- The efficiency of the SOAH hearings process could suffer if judges were inhibited from maintaining working notes and drafts of proposals for decisions and orders because of the negative effects of public disclosure. For example, judges may have to use more time-consuming alternatives to gather and process needed information, such as transcripts or audio tapes. Without thorough working notes and drafts of proposals for decisions and orders, documents would take longer to write and would be more difficult to supervise. If judges do not maintain working notes and drafts of proposals for decisions and orders, the agency loses a valuable internal resource for use in other cases or for answering other inquiries.

**Entities with comparable functions to SOAH are not subject to disclosure of their working papers and draft documents.**

- The Public Information Act provides numerous exceptions for information that are not subject to open records requests. The text box, *Examples of Exceptions to the TPIA*, lists certain exceptions to the Act. The Act does not cover the Judiciary; rather it provides that access to information collected, assembled, or maintained by or for the Judiciary is governed by rules adopted by the Supreme Court.

<b>Examples of Exceptions to the TPIA</b>
<p>The following types of public information are excepted from the Act.</p> <ul style="list-style-type: none"> <li>● Information Confidential by Law</li> <li>● Certain Personnel Information</li> <li>● Information Relating to Litigation or Settlement Negotiations Involving the State or Political Subdivision</li> <li>● Certain Legislative Documents</li> <li>● Certain Legal Matters</li> <li>● Certain Private Communications of an Elected Office-Holder</li> <li>● Certain Commercial Information</li> <li>● Agency Memoranda</li> <li>● Audit Working papers</li> <li>● Certain Personal Family Information</li> <li>● Certain Information for Computer Security</li> </ul>

- Other states' public information acts protect the draft orders and working notes of administrative law judges. For example, Kansas, New Mexico, and New York have exceptions to their Freedom of Information Act statutes that prevent disclosure of ALJ working notes and drafts of proposals for decisions and orders.

**While the disclosure of working papers and draft documents may adversely affect hearings, SOAH could do more to make its proposals for decision and final orders accessible to the public.**

*SOAH does not post its proposals for decisions or final orders on the Internet.*

- SOAH does not post its proposals for decisions or final orders, where it has final decisionmaking authority, on the Internet. As a result, the public and parties to hearings miss an opportunity to learn about SOAH decisionmaking and about how it has ruled on comparable issues and cases.
- Other state agencies make decisions available online. For example, the Public Utility Commission (PUC) provides access to proposals for decision for cases returned from SOAH, and the agency response, in a searchable format on its Web site. This information helps the parties and the general public keep up with contested case hearing progress, and serves as a research tool for those interested in past decisions.
- Other state's hearings agencies make proposals for decision available online in a searchable format. For example, California, Florida, Michigan, Minnesota, and New Jersey have searchable ALJ decision data bases available on their web-sites. Missouri, North Carolina, and South Carolina have key word search capacity, and have their ALJ decisions organized to facilitate a search of specific subject areas.

## Recommendation

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### Change in Statute

#### **4.1 Create an exception in the Texas Public Information Act for SOAH judges' working notes and drafts of proposals for decisions and orders.**

This recommendation would make an exception in the Texas Public Information Act for SOAH ALJs' working notes and drafts of proposals for decisions and orders for contested case hearings and alternative dispute resolutions. This recommendation would not except other SOAH records from release under the Act.

## Management Action

### 4.2 The agency should post proposals for decision and final orders on its Web site.

Making proposals for decision and final orders available on SOAH's Web site is the most efficient way to share this information with the public. SOAH should also consider the utility to the public and parties in contested cases in posting other public information such as final orders on its Web site.

## Impact

The recommendation providing an exception for SOAH judges' working notes and drafts of proposals for decisions and orders in the Texas Public Information Act would better protect the deliberative process by freeing judges to record their thoughts and impressions about cases without fear of second guessing. It would also clarify ambiguity in existing law and treat SOAH judges much the same as members of the Judiciary for purposes of public documents. To the extent such an exception gives these judges confidence that their personal thoughts will not be made public, it preserves their ability to maintain and use working notes and draft documents to help them reach decisions on matters before them.

While the review concluded that the public would derive no clear benefit from having access to judges' working notes and drafts, it would benefit from having better access to SOAH proposals for decision and final orders. This information would help the public and parties in contested cases have a better understanding of SOAH's decisionmaking process and how judges have ruled in comparable cases.

## Fiscal Implication

These recommendations will not have a fiscal impact to the State. Providing final case information online could involve small costs in formatting these documents for the agency's Web site. These costs should not be significant and can be done with existing resources.

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<sup>1</sup> Request for Attorney General decision on exceptions to disclosure under Texas Public Information Act; follow-up to letter of July 8, 2002, Paul Elliott, July 15, 2002.

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

<b>State Office of Administrative Hearings</b>	
<b>Recommendations</b>	<b>Across-the-Board Provisions</b>
	<b>A. GENERAL</b>
N/A	1. Require at least one-third public membership on state agency policymaking bodies.
Apply	2. Require specific provisions relating to conflicts of interest.
Apply	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.
N/A	4. Provide for the Governor to designate the presiding officer of a state agency's policymaking body.
Modify	5. Specify grounds for removal of a member of the policymaking body.
Apply	6. Require that information on standards of conduct be provided to members of policymaking bodies and agency employees.
Do Not Apply	7. Require training for members of policymaking bodies.
N/A	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.
Apply	10. Require information to be maintained on complaints.
Apply	11. Require development of an equal employment opportunity policy.
Apply	12. Require information and training on the State Employee Incentive Program.



## **AGENCY INFORMATION**

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# Agency Information

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## Agency at a Glance

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The State Office of Administrative Hearings (SOAH) was created in 1991 to conduct administrative law hearings and alternative dispute resolution proceedings involving Texas state agencies, other governmental entities, private citizens, and corporations doing business within the state.

### Key Facts

- **Funding.** In fiscal year 2002 SOAH operated with an annual budget of about \$8.5 million. SOAH's primary funding sources include General Revenue, State Highway Fund 006, and interagency contracts.
- **Staffing.** In 2002, SOAH had a staff of 118 employees out of 122 budgeted employees. The majority of the agency's staff works in Austin, while others are located in eight field offices.
- **Hearings.** More than 70 state agencies and local political subdivisions refer cases to SOAH. In 2001, SOAH spent the majority of its time on cases from the Texas Department of Public Safety, Texas Natural Resource Conservation Commission, and Public Utility Commission.
- **Alternative Dispute Resolution.** Each year more contested cases are referred to mediation. In fiscal year 2001, 80 cases were mediated. SOAH also began conducting arbitrations in 1997.

**On the Internet.**

General contact, docket, and rule information about SOAH is available at [www.soah.state.tx.us](http://www.soah.state.tx.us).

## Major Events in Agency History

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The Legislature created SOAH in 1991 to serve as an independent administrative tribunal. While the enabling legislation limited the agency's jurisdiction to hearings before state agencies that did not employ their own administrative law judges, it also provided for the review of other state agencies to determine if their hearings should be conducted by the office. The next year, SOAH began holding hearings with a staff of nine full-time employees to conduct hearings for 56 agencies. Over the next several legislative sessions, the Legislature added considerably to SOAH's responsibilities by transferring the hearings functions of other state agencies to the Office or by assigning it new programs. The largest of these additions were the transfer of administrative drivers license revocation hearings from the state's

justices of the peace, and the 1995 transfers of hearings functions from the Texas Natural Resource Conservation Commission and the Public Utility Commission. In 1997, the Legislature specifically authorized SOAH to conduct alternative dispute resolution, such as mediated settlements.

## Organization

### Chief Administrative Law Judge

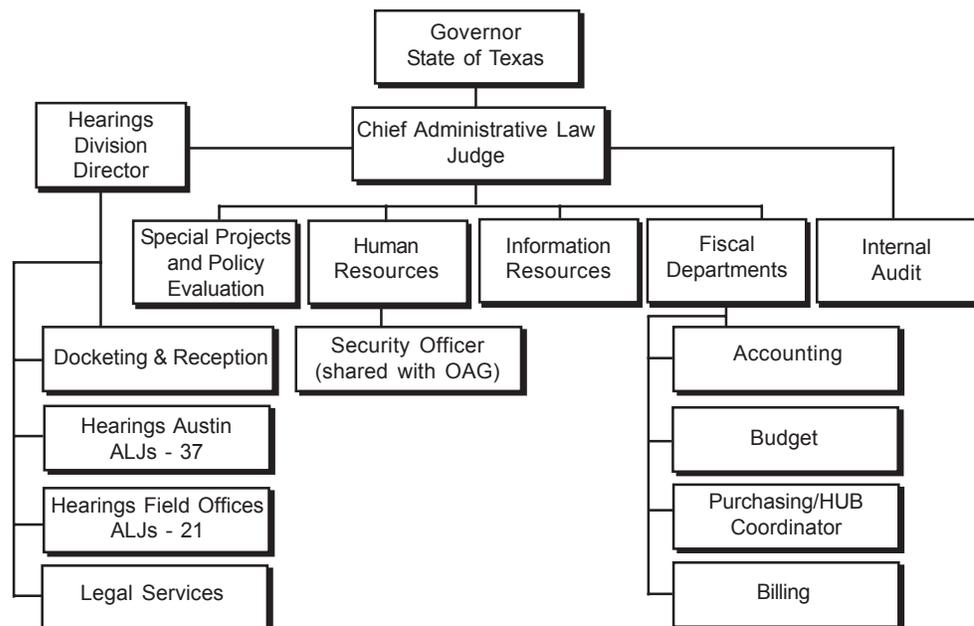
*SOAH does not have a governing board.*

SOAH does not have a governing board. The Governor appoints the Chief Administrative Law Judge (ALJ) for a two-year term with the advice and consent of the Senate. The Chief ALJ serves as the Executive Director for the agency with oversight of agency operations, and is also responsible for making policy decisions regarding internal agency operations. The current Chief ALJ is Shelia Bailey Taylor, who was first appointed in 1996, and reappointed in 1998 and 2000.

### Staff

In 2002 SOAH had a staff of 118 employees, 82 of whom worked in the agency's Austin headquarters. The other 36 employees work in the agency's field offices in Houston, Fort Worth, Dallas, San Antonio, El Paso, Corpus Christi, Lubbock, and Waco. The Chief ALJ oversees the agency's operations. The chart, *State Office of Administrative Hearings Organization*, depicts the organization of the agency and the number of employees in each division.

**State Office of Administrative Hearings  
Organizational Chart**



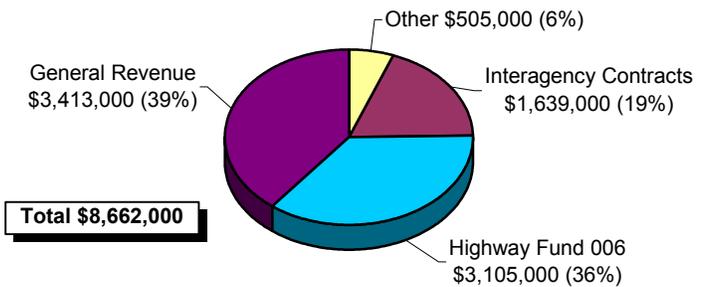
A comparison of the agency’s workforce composition to the minority civilian labor force over the past three years is shown in Appendix A, Equal Opportunity Statistics, 1998-2001. The State Office of Administrative Hearings has generally met civilian workforce levels for most job categories. SOAH has excelled in hiring African Americans and females in administrative positions, while it has lagged behind in hiring Hispanics in the professional category.

## Funding

### Revenues

SOAH has budgeted \$8,662,000 in revenue for fiscal year 2002. The pie chart, *SOAH Budgeted Revenue*, depicts the agency’s key revenue sources.

**Budgeted Revenue  
FY 2002**



General Revenue accounts for 39 percent of SOAH’s revenue of \$3.4 million, and includes the agency’s regular appropriations, legislatively authorized pay raises, and direct appropriations for certain agencies’ hearings. Table 1 in Appendix C lists those agencies with hearings covered through direct appropriation. The second significant source of funding is State Highway Fund 006, which provides \$3.1 million, roughly 36 percent of SOAH’s budget, to conduct administrative license revocation (ALR) hearings. These funds are appropriated directly to SOAH. Interagency contracts represent the third significant source of SOAH’s funding, accounting for \$1.6 million, or 19 percent of the agency’s revenue.

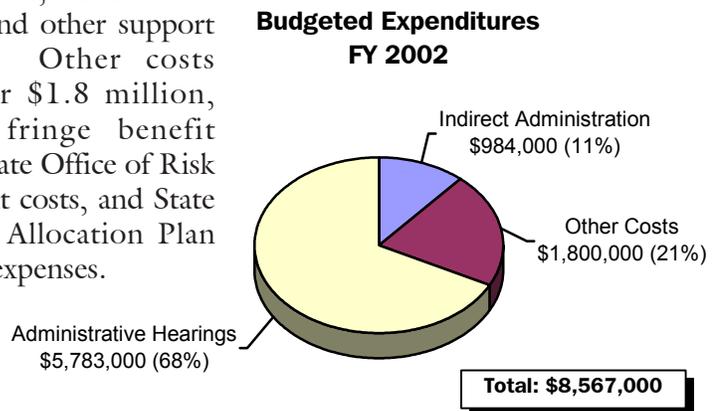
Agencies that contract with SOAH operate under three types of interagency arrangements. The first is the lump sum contract currently used only by the Texas Natural Resource Conservation Commission. Under this contract, the agency pays SOAH a set amount each year for hearing its contested cases, with either a refund or a arrangement renegotiation if an adjustment is needed at the end of the year. TNRCC’s contract with SOAH amounted to \$938,000 in FY 2002. The second type of arrangement involves the billing of agencies at the rate of \$90 for each hour of hearing conducted. Agencies with an hourly billing arrangement with SOAH are listed in Table 2 of Appendix C and include the Health and Human Services Commission, Department of Protective and Regulatory Services, and the Texas Department of Health. These agencies were estimated to pay \$557,000 in 2002. The third funding type involves agencies that already receive a direct appropriation from the Legislature for a set number of contested case hearings hours. If an agency’s contested cases take more than their allotted time, then the agency will be billed at \$90 per hour for the excess hours used. Table 3

in Appendix C lists those agencies, which were estimated to pay \$50,000 for excess workload in SOAH's 2002 budget.

**Expenditures**

SOAH budgeted \$8,567,000 in expenditures for FY 2002. The pie chart, *SOAH Budgeted Expenditures*, depicts the agency's primary expenditures.

The majority of SOAH's expenditures, \$5.8 million for 2002, are for its hearings function, including alternative dispute resolution (ADR). SOAH budgeted \$984,000 for indirect administration, including central administration, information resources, and other support functions. Other costs account for \$1.8 million, including fringe benefit expenses, State Office of Risk Management costs, and State Wide Cost Allocation Plan (SWCAP) expenses.



**Agency Operations**

**Agency Authority**

*In FY 2001, SOAH handled 21,548 cases for 50 state agencies and political subdivisions.*

The State Office of Administrative Hearings is responsible for contested case hearings for 71 state agencies and local political subdivisions. In fiscal year 2001, SOAH handled 21,548 cases for 50 state agencies and political subdivisions, consisting of more than 62,000 total case hours. The table, *Key Agencies Served by SOAH*, lists SOAH's largest customers since fiscal year 1996.

During SOAH's hearing process, SOAH administrative law judges (ALJs) are authorized to administer oaths, take testimony, rule on questions of evidence, issue orders related to discovery or other legal procedures, and issue proposals for decision (PFDs). ALJs have the authority to issue legal and financial sanctions for misconduct committed in the course of the hearing process. In most cases, the proposals for decision by SOAH judges are referred back to an agency's governing board or commission for final decision. In a few circumstances, SOAH decisions are final and can only be appealed to state district court.

The following material provides a brief description of how SOAH conducts contested case hearings and alternative dispute resolution proceedings for state agencies and other entities.

<b>Key Agencies Served by SOAH</b>			
<b>Agency Name</b>	<b>Average Number of Cases FY1996 -FY 2001</b>	<b>Average Number of Case Hours FY 1996 - FY 2001</b>	<b>Percent of Total Case Hours</b>
Department of Public Safety (ALR Program)*	16,078	21,764	35.2
Natural Resource Conservation Commission	291	9,714	15.7
Public Utility Commission	121	8,611	13.9
Workers' Compensation Commission	541	4,128	6.7
Department of Insurance	187	3,373	5.4
Alcoholic Beverage Commission	372	2,456	4.0
Employees' Retirement System	158	2,003	3.2
Department of Protective and Regulatory Services	92	1,166	1.9
Department of Human Services	152	1,149	1.9
State Board of Medical Examiners	53	865	1.4
Lottery Commission	457	743	1.2
Department of Transportation	40	495	0.8
<b>Total</b>	<b>18,542</b>	<b>56,467</b>	<b>91.2</b>

\*ALR program information is measured from FY 1998 to FY 2001. SOAH did not track the number of ALR case hours in FY 1996 and FY 1997.

## Case Procedures

The SOAH Chief Administrative Law Judge, based on statutory authority, has adopted procedural rules to govern SOAH hearings. The rules are described in greater detail in the text box, *SOAH Procedural Rules*. Except in the following circumstances, a referring agency's procedural rules do not apply to the hearings referred to SOAH unless the Chief ALJ chooses to adopt the agency rules by reference.

### SOAH Procedural Rules

SOAH has adopted a primary set of rules used for cases referred by a majority of agencies it serves. These rules are located in Texas Administrative Code, Title 1, Part 7, Chapter 155 (Rules of Procedures). The rules are patterned after the Texas Rules of Civil Procedure and the Administrative Procedure Act (Government Code, Chapter 2001), addressing issues such as admissibility and discovery of evidence, filing and serving of documents, and the authority of the ALJ to issue orders and proposals for decision. SOAH has also established separate sets of rules for Administrative License Revocation cases referred by the Department of Public Safety (TAC, Chapter 159), and for nursing home binding arbitration cases referred by the Department of Human Services (TAC, Chapter 163), due to the distinct nature of these cases.

For cases referred by the Public Utility Commission and the Texas Natural Resource Conservation Commission, SOAH has voluntarily adopted separate procedural rules that are essentially the same as the rules used by these agencies before the transfer of their hearings. SOAH is required to use the procedural rules of the Employee Retirement System (ERS) and the Railroad Commission (RRC) for cases referred by these agencies. If a conflict exists between the SOAH procedural rules and the rules of ERS or RRC, the latter control.

### **Hearing Teams**

*SOAH has divided its caseload into seven teams.*

Since 1999, SOAH has divided its caseload into seven teams, discussed below, based on the subject matter of the cases. Each SOAH judge belongs to at least two different teams and hears cases from at least two different subject areas. The types of cases heard by each team are discussed below. A more detailed breakdown of the SOAH caseload for FY 2001 is in Appendix D, Team Workload - FY 2001.

Administrative License Revocation (ALR) and Field Enforcement. In 1993, the Legislature transferred the contested case hearings for defendants arrested for Driving Under the Influence (DUI) or Driving While Intoxicated (DWI) from the local justice of the peace courts to SOAH. The ALR program allows defendants to appeal the suspension of their drivers licenses in a SOAH administrative hearing. Nearly 20,000 individuals, about 20 percent of all individuals arrested for DUI or DWI, appealed their license suspensions in fiscal year 2001.

The statute requires ALR cases to be heard in counties with a population of more than 300,000, or within 75 miles of the seat of the county of arrest. Eighty percent of all ALR cases are heard at the SOAH field office or remote site nearest to the county of arrest. Field office ALJs also hear other cases with statutory requirements to hold hearings in the SOAH office nearest to the defendant's residence, including alcoholic beverage permit sanctions by the Alcoholic Beverage Commission, and license suspensions and revocations for child care facility employees by the Department of Protective and Regulatory Services. For the locations of field offices and remote site locations, see Appendix E, Field Office and Remote Site Locations.

*SOAH issues final decisions on Workers' compensation cases, which are appealable in district court.*

Economic. The Economic Team focuses primarily on cases from the Texas Workers' Compensation Commission (TWCC) involving disputes over the medical necessity for a procedure performed to address a claim, or the fee charged for a medical procedure. Unlike most cases, SOAH issues final decisions in TWCC cases which are appealable in civil district court. Other frequent cases include sanctions levied by the Department of Insurance against insurance agents and carriers; enforcement by the Department of Transportation of statutes and rules for motor carriers

and contract disputes involving TxDOT contractors; and enforcement of manufactured housing statutes and rules by the Department of Housing and Community Affairs.

Licensing and Enforcement. The Licensing and Enforcement Team hears licensing and enforcement cases from the state's non-medical occupational licensing agencies and other regulatory agencies. High volume agencies include the Department of Human Services for actions against nursing homes, nursing home staff, and assisted living facilities and staff; the State Board of Educator Certification for actions against certified teachers, teacher aides and school administrators; and the Lottery Commission for actions against lottery and bingo licensees.

Medical. The Medical Team hears the majority of its cases from TWCC (pre-authorization of medical treatment for injured workers) and Employee Retirement System (denial of benefits appeals). The team also hears appeals of occupational license violations for ten different health care licensing boards, including the boards of Medical Examiners, Nursing Examiners, Vocational Nursing Examiners, and Dental Examiners.

Natural Resources. The Natural Resources Team assumes the function of the Natural Resources Conservation division required by SOAH's governing statute. The team focuses primarily on contested cases from the Texas Natural Resource Conservation Commission, including requests for emission permits, enforcement actions against emissions violations, and expansion of water and wastewater services. The team also hears a limited number of cases from the Department of Agriculture, the Parks and Wildlife Department, the Structural Pest Control Board, and starting in 2001, the Edwards Aquifer Authority.

Utilities. The Utilities Team hears contested cases for the Public Utility Commission and, starting in 2001, gas utility cases from the Railroad Commission (RRC). The team assumes the functions of the Utility division required by SOAH's governing statute. SOAH judges who hear Utilities cases must have at least five years of experience as a practicing attorney or three years of experience with utilities law. The team hears telecommunications and electric utility rate cases, enforcement actions, complaints against utilities brought by consumers and other utilities, and applications for certificates of convenience and necessity. The team has heard only two RRC cases since 2001.

*The Utilities Team began hearing gas utility cases for the Railroad Commission in 2001.*

Alternative Dispute Resolution (ADR). The ADR Team provides mediations, arbitrations, and other alternative dispute resolution services to state agencies and other governmental entities. Mediation services include mediated settlement conferences, for cases at SOAH in which the parties attempt to settle before continuing with a hearing; and original mediations for cases that are not pending before SOAH.

Arbitration services include binding arbitrations required by law for enforcement actions against nursing homes by the Department of Human Services, and quasi-arbitrations to resolve contract claims against the State.

# APPENDICES

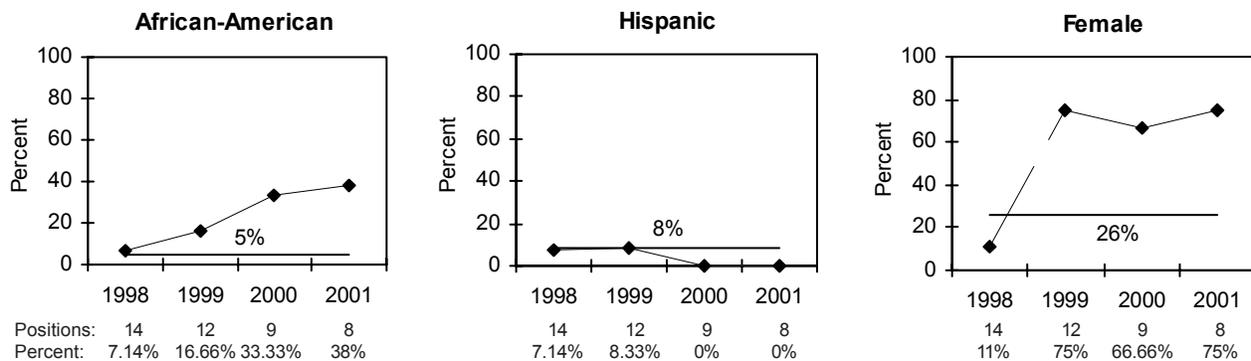
## Appendix A

### Equal Employment Opportunity Statistics

#### 1998 to 2001

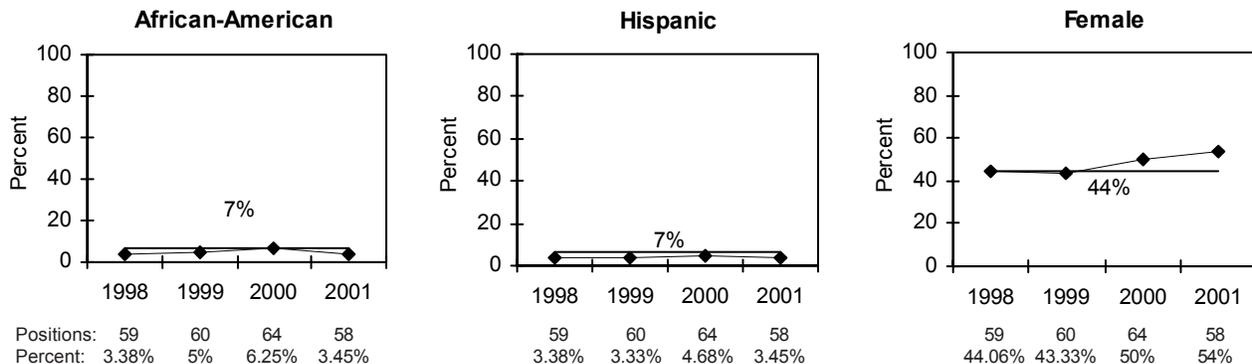
In accordance with the requirements of the Sunset Act, the following material shows trend information for the State Office of Administrative Hearings employment of minorities and females in all applicable categories of the labor force.<sup>1</sup> The agency maintains and reports this information under guidelines established by the Texas Commission on Human Rights.<sup>2</sup> In the charts, the flat lines represent the percentages of African-Americans, Hispanics, and females in each job category. These percentages provide a yardstick for measuring agencies' performance in employing persons in each of these groups. The dashed lines represent the agency's actual employment percentages in each job category from 1998 to 2001. The agency does not employ persons in some job categories – skilled craft and service/maintenance.

#### State Agency Administration



SOAH exceeds the civilian labor force standards for African-Americans and Females in this category. The agency generally meets or falls below the standards for Hispanics.

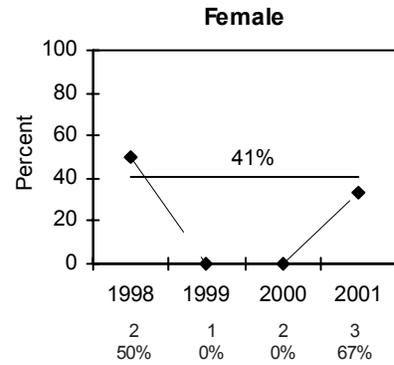
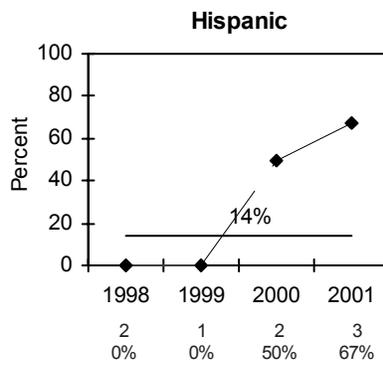
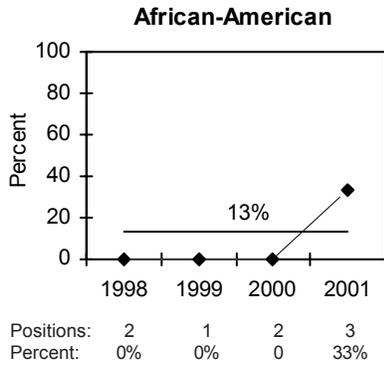
#### Professional



SOAH has slightly fallen below the civilian labor force standards for African-Americans and Hispanics in this category, though it exceeded the standard for Females.

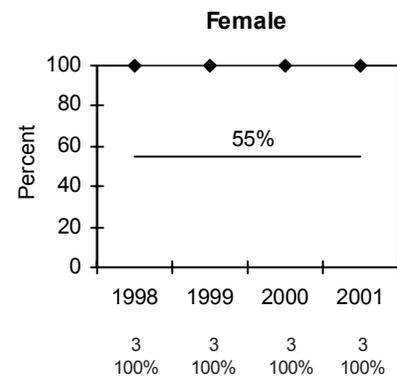
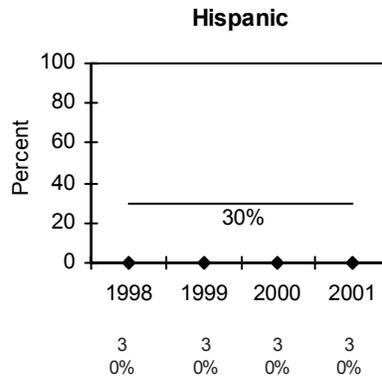
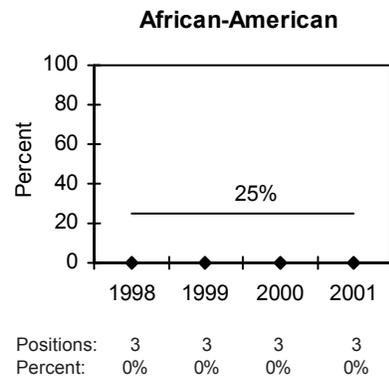
## Appendix A

### Technical



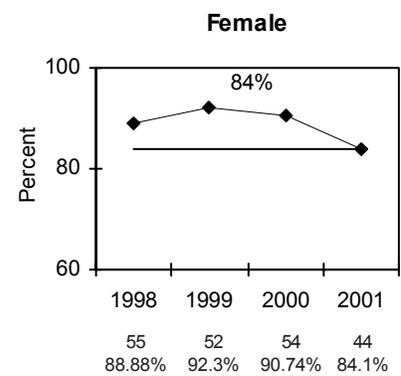
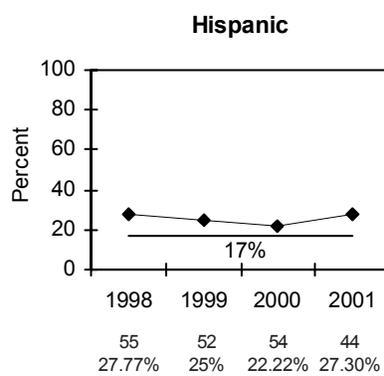
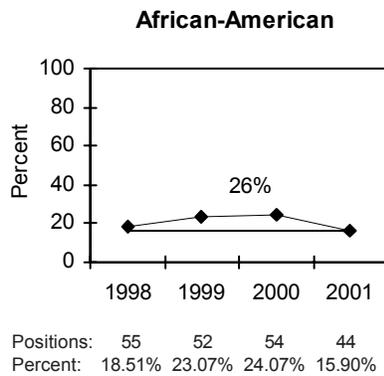
SOAH employs only two employees in the technical category.

### Para-Professional Support



SOAH employs three Females as professional support.

### Administrative Support



SOAH exceeds the civilian labor force standards in this category.

<sup>1</sup> Texas Government Code, ch. 325, sec. 325.011(9)(A).

<sup>2</sup> Texas Labor Code, ch. 21, sec. 21.501

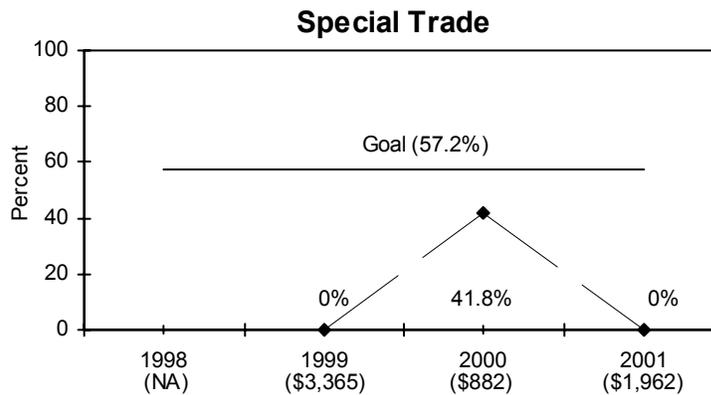
## Appendix B

### Historically Underutilized Businesses Statistics

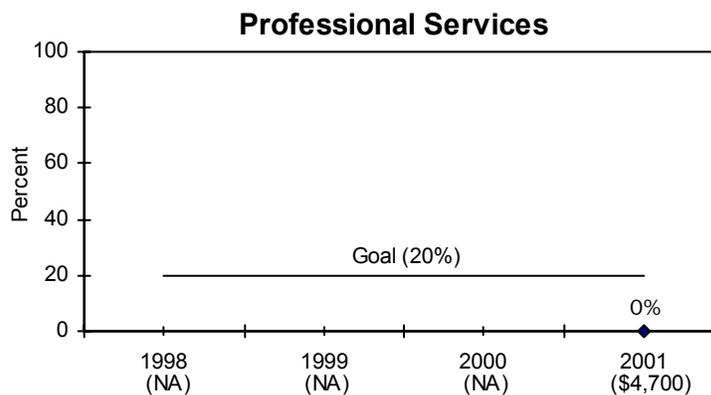
#### 1998 to 2001

The Legislature has encouraged state agencies to increase their use of Historically Underutilized Businesses (HUBs) to promote full and equal opportunities for all businesses in state procurement. The Legislature also requires the Sunset Commission to consider agencies' compliance with laws and rules regarding HUB use in its reviews.<sup>1</sup>

The following material shows trend information for the State Office of Administrative Hearings use of HUBs in purchasing goods and services. The agency maintains and reports this information under guidelines in the Texas Building and Procurement Commission's statute.<sup>2</sup> In the charts, the flat lines represent the goal for HUB purchasing in each category, as established by the Texas Building and Procurement Commission. The dashed lines represent the percentage of each spending with HUBs in each purchasing category from 1998 to 2001. Finally, the number in parentheses under each year shows the total amount the agency spent in each purchasing category. The agency has fallen below the state goal for special trade and professional services. SOAH generally surpassed the goal for other services and commodities spending.

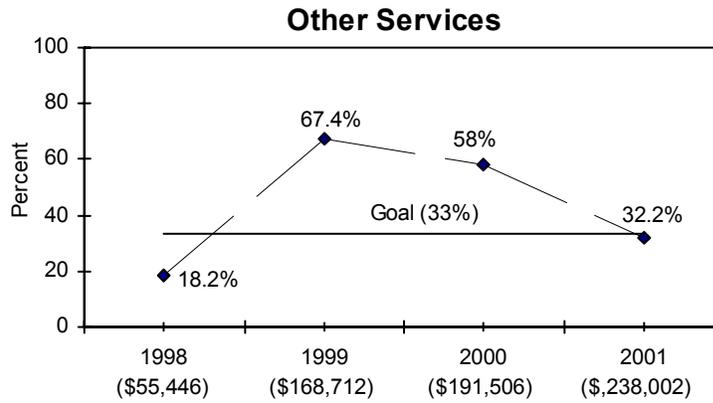


SOAH fell below the state goal from 1998 to 2001.

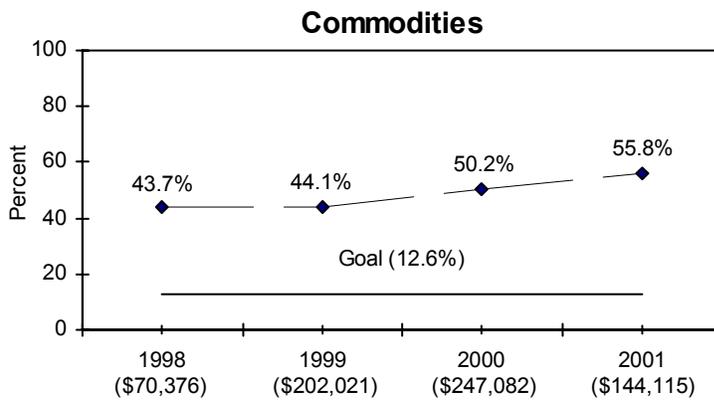


SOAH did not purchase any professional services between 1998 and 2000. The agency's purchases in 2001 fell below the state's goal.

## Appendix B



SOAH exceeded the State's goal in 1999 and 2000, and fell below the goal in 1998 and slightly in 2001.



The agency exceeded the state goal from 1998 to 2001.

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

<sup>2</sup> Texas Government Code, ch. 2161.

## Appendix C

### Agency Funding Arrangements

#### Table 1 – Direct Appropriation

State Board of Architectural Examiners  
Board of Barber Examiners  
State Board of Chiropractic Examiners  
Texas Cosmetology Commission  
Credit Union Department  
State Board of Dental Examiners  
Real Estate Commission (Appraisers License and Certification Board only)  
Funeral Service Commission  
State Board of Medical Examiners  
Board of Nurse Examiners  
Board of Vocational Nurse Examiners  
Optometry Board  
State Board of Pharmacy  
Executive Council of Physical and Occupational Therapy Examiners  
State Board of Plumbing Examiners  
State Board of Public Accountancy  
State Board of Podiatric Medical Examiners  
State Board of Registration for Professional Engineers  
Board of Tax Professional Examiners  
Board of Professional Land Surveying  
State Board of Examiners of Psychologists  
Department of Public Safety  
Structural Pest Control Board  
Public Utility Commission  
Board of Veterinary Medical Examiners

## Appendix C

### Agency Funding Arrangements

#### Table 2 – Hourly Contracts

Animal Health Commission  
Attorney General (voluntary)\*  
Board of Educator Certification  
Ethics Commission  
General Land Office  
Department of Health (Excluding the four GR funded sub agencies)  
Health and Human Services Commission  
Department of Human Services  
Texas Natural Resources Conservation Commission  
Commission on Private Security  
Department of Protective and Regulatory Services  
Department of Public Safety (transcripts)  
Texas Municipal Retirement System (voluntary)\*  
Texas County and District Retirement System (voluntary)\*  
Uvalde Underground Water District (voluntary)\*  
Texas Youth Commission (voluntary)\*  
Evergreen Underground Water District (voluntary)\*  
Edwards Aquifer Authority (voluntary)\*  
City of Denton (voluntary)\*  
Railroad Commission (voluntary)\*

\* Voluntary hearings are not required by statute.

## Appendix C

### Agency Funding Arrangements

**Table 3 – General Revenue Funded with Excess Workload Billing**

Department on Aging  
Department of Agriculture  
Alcoholic Beverage Commission  
Texas Commission on Alcohol and Drug Abuse  
Commission for the Blind  
Employees Retirement System  
Commission on Fire Protection  
Firefighters' Pension Commissioner  
Department of Health sub agencies:  
    Board of Marriage and Family Counselors  
    Board of Perfusionists  
    Board of Examiners of Professional Counselors  
    Board of Social Worker Examiners  
Higher Education Coordinating Board  
Department of Housing and Community Affairs  
Commission on Human Rights  
Department of Insurance  
Commission of Law Enforcement Officer Standards and Education  
Lottery Commission  
Parks and Wildlife Department  
Secretary of State  
Department of Public Safety (non-ALR)  
Racing Commission  
State Securities Board  
Teacher Retirement System  
Department of Transportation  
Workforce Commission  
Workers Compensation Commission



## Appendix D

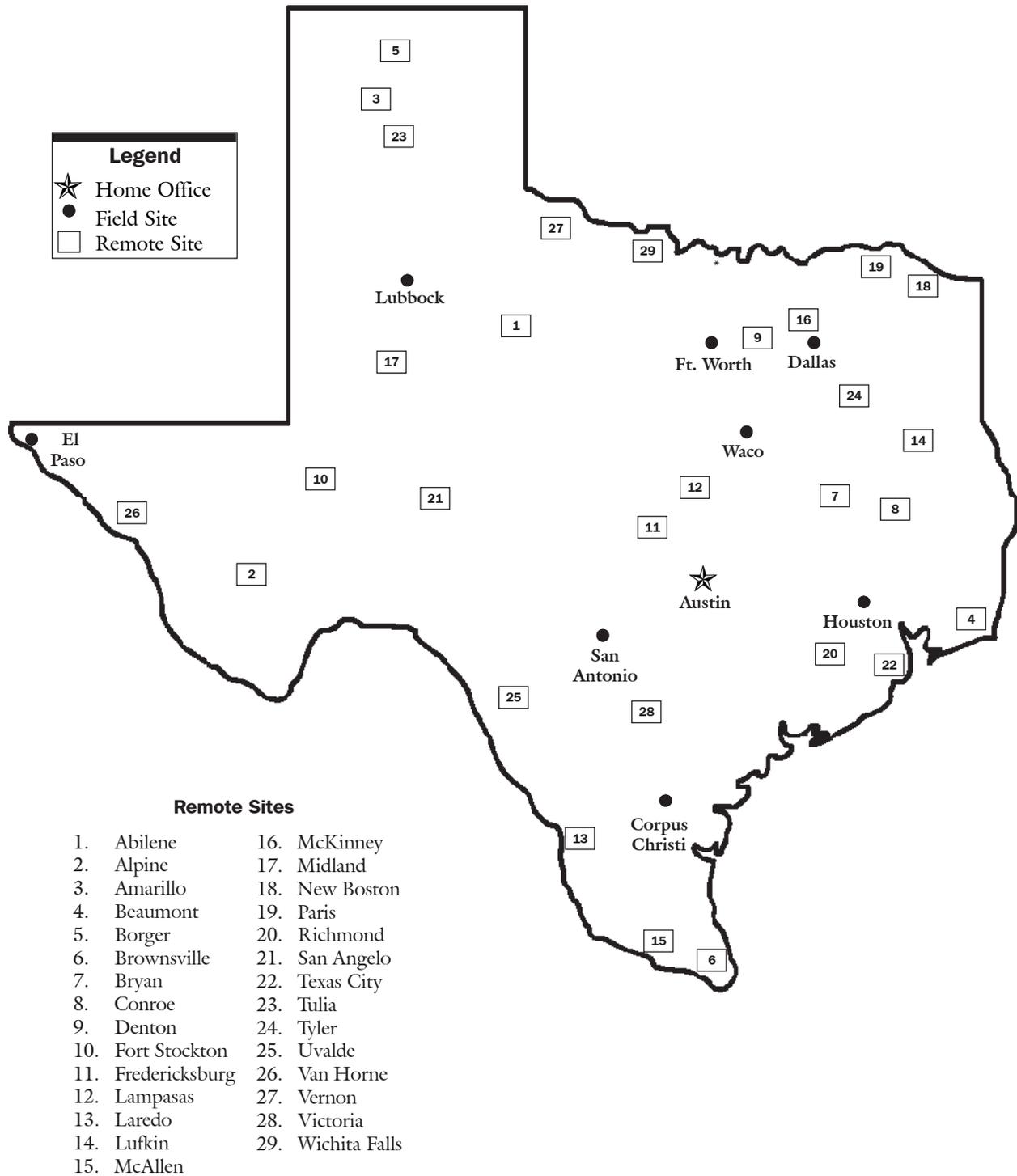
### Team Workload - FY 2001

Team Workload - FY 2001							
Team Name	No. of Judges	No. of Cases	No. of Case Hours	Avg. Hours per Case	No. of Agencies	Major Agencies (% of Team Workload by case hours)	
Administrative License Revocation (ALR) Field Enforcement	All	17,943	23,619	1.3	5	<ul style="list-style-type: none"> <li>• Department of Public Safety ALR program (82%)</li> <li>• Alcoholic Beverage Commission (9%)</li> <li>• Department of Protective and Regulatory Services (8%)</li> </ul>	
Economic	30	840	7,526	9.0	14	<ul style="list-style-type: none"> <li>• Workers Compensation Commission - medical necessity/fee dispute cases (47%)</li> <li>• Department of Insurance (37%)</li> <li>• Department of Transportation (12%)</li> </ul>	
Licensing and Enforcement	34	1,650	5,831	3.5	18	<ul style="list-style-type: none"> <li>• Department of Human Services (55%)</li> <li>• State Board of Educator Certification (9%)</li> <li>• Lottery Commission (8%)</li> <li>• Department of Public Safety non-ALR cases 8%</li> </ul>	
Medical	31	566	6,606	11.7	10	<ul style="list-style-type: none"> <li>• Employee Retirement System (35%)</li> <li>• Workers Compensation Commission pre-authorization cases (23%)</li> <li>• Board of Medical Examiners (16%)</li> <li>• Board of Nurse Examiners (9%)</li> </ul>	
Natural Resources	23	270	7,840	28.9	6	<ul style="list-style-type: none"> <li>• Natural Resources Conservation Commission (99%)</li> </ul>	
Utilities	17	111	9,514	85.7	1	<ul style="list-style-type: none"> <li>• Public Utility Commission (100%)</li> </ul>	
Alternative Dispute Resolution (ADR)	32	168	1,860	11.1	20	<ul style="list-style-type: none"> <li>• Department of Human Services (36%)</li> <li>• Board of Medical Examiners (24%)</li> <li>• Natural Resource Conservation Commission (13%)</li> <li>• Public Utility Commission (9%)</li> </ul>	



## Appendix E

### Field Office and Remote Site Locations





## Appendix F

### Results of Sunset Survey of State Agencies

As part of the review of the State Office of Administrative Hearings, Sunset staff designed and fielded a survey for agencies with contested cases before SOAH. The survey was sent to 48 state agencies in June 2002. Staff received 31 responses, 65 percent of the total number of agencies surveyed. A list of agencies that responded to this survey and those that did not is attached to the end of this appendix.

The chart below summarizes the responses received and shows selected comments made by respondents. The names of the agencies and references to regulated industries have been omitted to protect respondents' confidentiality. Some responses have been edited for this compilation.

Survey Responses	
Question	Response
Does your agency's method of funding for hearings at SOAH work well?	<p>Eighteen replied that their funding works well. The majority of respondents saying that their funding works well have their hearings funded through direct appropriation. Eight respondents replied that their method of funding does not work well, while three reported that it sometimes works.</p> <ul style="list-style-type: none"> <li>- "We are often reluctant to refer a case to SOAH. State agencies should not be charged a fee to bring administrative cases. This serves as a powerful disincentive to initiate any action in a SOAH forum."</li> <li>- The current "funding relationship hinders [the agency] in its ability to enforce the professional standards of the [regulated] profession because it effectively penalizes [the agency] for increasing its enforcement activity."</li> <li>- "The agency has resolved many cases prior to hearing in order to avoid the cost to the agency and the licensee of a SOAH hearing."</li> </ul>
What method of funding for SOAH would you prefer?	<p>The majority (19) of responses identified direct appropriation as the preferred funding method. Five preferred direct appropriations with excess hours paid by the agency, while three preferred contracting with SOAH.</p> <ul style="list-style-type: none"> <li>- "Allow unlimited access to SOAH judges. Capping of number of hours is an impediment to aggressively pursuing cases."</li> <li>- "It is not the cost of the SOAH judge, etc. that impacts us, it is the cost for providing expert medical witnesses, and most particularly, the cost for transcripts of the hearing and pre-hearing depositions that prevent us from being able to bring numerous pending cases before SOAH."</li> <li>- "[This agency] recommends that SOAH receive funding through direct appropriation from the legislature. [Agency] staff believes that the contractual nature of its relationship with SOAH is overly expensive and interferes with [agency's] ability to control litigation expenses. This is because [the agency] is billed for SOAH services on an hourly basis, in a manner that is similar to the billing relationship between a private law firm and a client."</li> <li>- "Pass through billings to the local departments utilizing SOAH."</li> </ul>

## Appendix F

<b>Survey Responses</b>	
<b>Question</b>	<b>Response</b>
Has your agency ever had to spend more than it budgeted for SOAH hearings? If so, in what fiscal year and how much was spent?	<p>Twelve agencies reported spending more for SOAH hearings than they had budgeted for.</p> <ul style="list-style-type: none"> <li>- "In FY 2001, fees that exceeded the direct appropriations were waived by SOAH because the agency had no money within its budget to pay for the excess hours."</li> <li>- "FY 2001. Our bill for a one day trial at SOAH was \$10,777.34."</li> <li>- "[Agency] ultimately paid \$1,900 over the contracted cap."</li> <li>- "FY 2000 - \$4,000; FY 2001 - \$11,000; FY 2002 - predict OVER \$200,000."</li> <li>- "2000 - \$22,946.22; 2001 - \$54,999.17."</li> <li>- "[W]e spent \$2,278 in 2000, although we had not budgeted any SOAH expenses for that year."</li> <li>- "FY 2000 - \$2,500."</li> <li>- "FY 2002, over \$10,000 and counting."</li> </ul>
Has your agency ever delayed the referral of cases to SOAH due to lack of funds? How many cases were delayed?	<p>Seven agencies reported having delayed the referral of cases to SOAH because of the lack of funds.</p> <ul style="list-style-type: none"> <li>- "We presently have three cases that are waiting for money to allow us to have SOAH hearings and another ten cases that have findings of violations of Rules/Statutes."</li> </ul>
Are hearings at SOAH less expensive than those conducted in-house?	<p>One agency reported that SOAH is less expensive than in-house hearings, while six agencies reported that SOAH hearings are more expensive than those conducted in-house. Nineteen respondents did not know if one hearing method is cheaper than the other.</p>
Is SOAH's hourly billing reasonable?	<p>Eleven agencies identified SOAH's billings as reasonable. Six agencies responded that it is not.</p>
How would you rate the rules and procedures adopted by SOAH in facilitating efficient and effective hearings?	<p>Six agencies rated the rules and procedures as "excellent", fifteen as "good", and seven as "fair".</p>
Do contested case hearings from your agency warrant special procedural rules? If yes, please identify which SOAH rules cause problems for your agency and how they could be improved.	<p>Eighteen agencies responded that their cases do not warrant special procedural rules. Ten agencies stated that their contested case hearings require special rules. Two agencies replied that they do not know if their cases merit particular rules.</p> <ul style="list-style-type: none"> <li>- "This problem should be addressed by revising SOAH's rules to conform to the Texas Rules of Civil Procedure as revised. If such a revision is not possible, then SOAH should adopt internal policies to promote consistent rulings by the ALJs and make those rulings known to the agencies who litigate contested case proceedings at SOAH."</li> <li>- "The problems we have experienced have resulted mostly from the procedural rules' lack of detail rather than from issues related specifically to this agency. Many procedural questions cannot be resolved through reference to the rules. It would be beneficial if the rules were more similar to the rules of civil procedure. Both efficiency and consistency would be enhanced."</li> </ul>

## Appendix F

<b>Survey Responses</b>	
<b>Question</b>	<b>Response</b>
Do contested case hearings from your agency warrant special procedural rules? If yes, please identify which SOAH rules cause problems for your agency and how they could be improved. (cont.)	<ul style="list-style-type: none"> <li>- "The Agency's direct (materials) and indirect (staff) costs to comply with all procedures that relate to SOAH, which conclude with the letter notifying respondents of the final orders, equal approximately \$90 per case. That is not cost effective."</li> <li>- "Many of SOAH procedural rules are not applicable to [regulated industry] summary suspension hearings."</li> </ul>
Have you expressed any concerns to SOAH about rules and procedures that negatively impact the hearings for your agency? If yes, how has SOAH acknowledged and/or addressed your concerns?	<p>The majority (21) of agencies surveyed did not raise any concerns regarding SOAH's rules and procedures. Nine agencies reported raising concerns. Those that did raise concerns reported the following:</p> <ul style="list-style-type: none"> <li>- "No action was taken."</li> <li>- "They took oral and written comments and were responsive to our concerns."</li> </ul>
Have you had to file a complaint with SOAH? If yes, how would you rate the way your complaint was handled?	<p>The majority (25) of respondents did not file a complaint with SOAH. Six agencies filed a complaint. Of those that filed a complaint, one said that SOAH's complaint handling was "good", two reported that it was "fair", two replied "poor", and one declined to comment.</p>
How would you rate the ability of SOAH's administrative law judges to provide fair and impartial hearings?	<p>Nine agencies rated SOAH's ALJs as "excellent", thirteen as "good", and nine as "fair".</p> <ul style="list-style-type: none"> <li>- "They lack expertise on issues and that is an impediment."</li> <li>- "Some ALJs are poor, some fair and some good."</li> <li>- "SOAH judges are not neutral judges all the time. If a pro se defendant or first time attorney shows up, the judges will ask non-clarification questions that are biased and help the defendant. No such equality in questioning exists back toward the state's representative."</li> <li>- "Impartiality as a neutral trier of fact prejudiced by over-zealous concern for respondent, inconsistent use of rules, and lack of appeal by agency."</li> </ul>
Does SOAH process cases in a timely manner?	<p>The majority (23) of agencies responded that SOAH processes cases in a timely manner.</p>
How would you rate the overall quality of the proposals for decision issued by SOAH judges?	<p>Seven agencies rated the ALJ quality as "excellent", fifteen as "good", and eight as "fair".</p> <ul style="list-style-type: none"> <li>- "Oftentimes, changes and corrections are required."</li> <li>- "Some proposals for decision are good, others are extremely poor."</li> <li>- "Proposals for decisions are too long and include opinion of the ALJ, not just findings of fact and conclusions of law."</li> </ul>
Are the findings of fact and conclusions of law within SOAH's PFDs reasonable?	<p>Nineteen agencies responded that the findings of fact and conclusions of law within SOAH's PFDs are reasonable. Nine agencies responded that they were sometimes reasonable, and one agency responded that they are not at all reasonable.</p> <ul style="list-style-type: none"> <li>- "Most of SOAH's findings of fact and conclusions of law in a PFD are usually reasonable. Most PFDs contain a few findings and conclusions that are found to be incorrect, and in just a few PFDs, a large number were found to be incorrect."</li> </ul>

## Appendix F

<b>Survey Responses</b>	
<b>Question</b>	<b>Response</b>
Are the findings of fact and conclusions of law within SOAH's PFDs reasonable?(cont.)	<ul style="list-style-type: none"> <li>- "But SOAH continues to include as a Conclusion of Law, a recommended disposition of the case which is within the purview of the policy making body."</li> <li>- "SOAH's ALJs should not make recommendations as to sanctions. This should be in the sole province of the agency. They should only make findings of fact and conclusions of law. They should not express an opinion on the sanction as they are not familiar with the standards of the agency or the industry."</li> </ul>
How would you rate the knowledge and expertise of SOAH judges to understand the legal issues in cases referred by your agency?	<p>Six agencies rated the ALJs' knowledge and expertise as "excellent", fourteen rated it as "good", and eight rated it as "fair". Three agencies responded that the quality of expertise varies.</p> <ul style="list-style-type: none"> <li>- "In some cases, attorneys for [agency] handling complex regulatory cases have perceived that the ALJ did not understand the technical regulation."</li> <li>- "Some ALJs have better understanding of [regulated industry] issues than others."</li> <li>- "It varies depending on the ALJ."</li> <li>- "Good on traditional administrative law matters but concerned about whether ALJs possess requisite knowledge and expertise in connection with contract law matters involved in [statute]."</li> <li>- "Varies in proportion to experience."</li> </ul>
Overall, how do you rate the performance of SOAH?	<p>Seven agencies rated SOAH's performance as "excellent", fourteen rated it as "good", seven as "fair", and one as "poor". Two agencies declined to answer.</p> <ul style="list-style-type: none"> <li>- "It varies depending on the ALJ."</li> <li>- "The system is poor because it is too complicated and takes too long."</li> </ul>
Does Texas need an independent office of administrative hearings?	<p>The majority (23) of respondents said that Texas needs an independent office of administrative hearings. Five agencies reported that the state does not need an independent office.</p> <ul style="list-style-type: none"> <li>- "Although an independent hearings office is beneficial for certain agencies and certain cases, it is not the most effective way to hear smaller cases that do not involve discovery or complex evidentiary matters, and may last for a day or less."</li> <li>- "Need impartial trier of facts."</li> </ul>
Which hearing method would you prefer?	<p>Twenty-two agencies prefer SOAH. Six agencies prefer conducting hearings in-house, and one preferred contracting out for hearings.</p> <ul style="list-style-type: none"> <li>- "Our Board used to hold contested hearings before the Board... This was a much faster and more cost-effective way to deal with contested cases."</li> </ul>
Additional comments	<ul style="list-style-type: none"> <li>- "Attorneys for [agency] practicing before SOAH in contested cases have experienced some cases where an ALJ issued a PFD that is not supported by statute/rules or issued a discipline recommendation that is too favorable to the regulated entity."</li> </ul>

## Appendix F

<b>Survey Responses</b>	
<b>Question</b>	<b>Response</b>
Additional comments (cont.)	<ul style="list-style-type: none"> <li>- The biggest problem this agency has had with SOAH is the excessive number of hours spent on cases while preparing a PFD. Default judgments should be fairly short in terms of preparation... During default judgments, more questions are asked than the basic two: ‘Do you have proof of service and do you want a default judgment?’ Questions about the case and fine assessment are asked which are not appropriate at such a hearing.”</li> <li>- “In the days when cases were handled in-house, they were expedient and efficient. The expertise was there on every case and the system worked better. Respondents were able to appeal to the state court system when, and if, they felt that they were wronged.”</li> <li>- “SOAH does not publish the PFDs that it issues. This adversely impacts all parties who appear for case proceedings because there is no available resource from which the parties can discern how SOAH ALJs interpret questions of law and procedure. Therefore, the parties are required to ‘reinvent the wheel’ every time such issues arise... [P]ublication allows the parties to research prior decisions and argue that the precedent created by those decisions should govern the outcome of their own dispute.”</li> <li>- “New procedures and oversight need to be implemented to streamline a process that has become far too lengthy and complicated. ALJs need to be consistent in the application of statutes and rules. There needs to be some procedure for interlocutory appeals by the agency of adverse evidentiary and procedural rulings.”</li> <li>- “[Agency] remains concerned that certain systemic problems prevent SOAH from providing consistently fair and impartial hearing examiner services on [agency] matters... A nonexhaustive list of problems [this agency] has experienced in this regard include the following: (1) Advocacy by ALJs on behalf of [agency] Appellants... (2) Researching issues sua sponte in a manner that ignores controlling law and encourages appellants to pursue legally flawed arguments in connection with their appeals... (3) Encouraging an appellant to prosecute her appeal after she has clearly expressed her intent to dismiss her appeal. (4) Granting conditional dismissals in violation of [agency] rules and normal rules of civil procedure... (5) Failing and refusing to review, weigh and analyze evidence in a reasonable and impartial manner... (6) Reminding appellant/witnesses when appellant forgets to offer evidence on a material issue in his appeal. (7) Asking [agency] attorneys to assist appellants regarding the presentation of their cases.”</li> <li>- “SOAH should be able to attract and retain knowledgeable and well qualified judges. The salary levels of ALJs’ should be reviewed to determine whether salary levels are appropriate.”</li> <li>- “The Administrative Procedure Act should be revised to require SOAH to issue subpoenas and Commissioner’s to take depositions in contested case hearings. Currently, the APA requires the agency to issue but the inconsistency in what entity is handling the procedural aspects causes confusion to both the agency and attorney practicing before the agency and SOAH.</li> <li>- “I believe by having an independent hearings office, the public perception is that they will receive a fair and unbiased opportunity to be heard. For that reason, I believe SOAH should remain in existence.”</li> </ul>

## Appendix F

<b>Agencies that Responded to Survey</b>			
Department on Aging	Commission on Alcohol and Drug Abuse	Board of Architectural Examiners	Board of Barber Examiners
Commission for the Blind	Board of Chiropractic Examiners	Cosmetology Commission	Credit Union Department
Board of Dental Examiners	State Board for Educator Certification	Employees Retirement System	Texas Ethics Commission
Office of the Firefighters' Pension Commissioner	Texas Department of Health	Department of Housing and Community Affairs	Texas Lottery Commission
State Board of Medical Examiners	Texas Natural Resource Conservation Commission	Board of Vocational Nurse Examiners	State Board of Pharmacy
Executive Council of PT/OT Examiners	Board of Podiatric Medical Examiners	Department of Public Safety	Public Utility Commission
Texas Racing Commission	Secretary of State	State Securities Board	Structural Pest Control Board
Board of Veterinary Medical Examiners	Texas Workers' Compensation Commission	Texas Youth Commission	

<b>Agencies That Did Not Respond to Survey</b>			
State Board of Public Accountancy	Department of Agriculture	Alcoholic Beverage Commission	Appraiser Licensing and Certification Board
County and District* Retirement System	Board of Professional Engineers	General Land Office	Commission on Human Rights
Department of Insurance	Municipal Retirement System	Board of Nurse Examiners	Parks and Wildlife Department
Commission on Private Security	Department of Protective and Regulatory Services	State Board of Examiners of Psychologists	Department of Transportation
Workforce* Commission			

\*Last held hearings in 1999.

## **Appendix G**

### **Staff Review Activities**

The Sunset staff engaged in the following activities during the review of the State Office of Administrative Hearings.

- Met with the team leaders of the following administrative hearings teams: Administrative License Revocation and Field Enforcement; Economic; Licensing and Enforcement; Medical; Natural Resources; Utilities; and Alternative Dispute Resolution. Staff also met with the managers of the Human Resources, Information Resources, Accounting, and Docketing divisions, as well as the manager of Special Projects and Policy Evaluation.
- Attended team leader meetings and other administrative meetings held by SOAH staff.
- Met with administrative law judges and observed hearings at the Fort Worth, Dallas, and Houston field offices.
- Observed hearings brought by the Texas Alcoholic Beverage Commission, Texas Natural Resource Conservation Commission, Public Utility Commission, Department of Protective and Regulatory Services, and the Department of Public Safety. Staff also observed a SOAH docket call for the Texas Commission on Law Enforcement Standards and Education.
- Surveyed all referring agencies via electronic mail concerning the performance of SOAH.
- Met with representatives from the following ten agencies that referred over 90 percent of SOAH's workload from 1996 to 2001: Texas Natural Resource Conservation Commission; Department of Public Safety; Public Utility Commission; Texas Alcoholic Beverage Commission; Workers Compensation Commission; Department of Human Services; Department of Protective and Regulatory Services; Employee Retirement System; State Board of Medical Examiners; and the Department of Insurance.
- Surveyed and met with numerous interest groups.
- Attended two continuing law education courses sponsored by the Administrative Law Section of the Travis County Bar Association.
- Researched and surveyed Central Hearings Panels in other states with similar programs and functions.
- Reviewed SOAH financial and internal audit reports, past legislation affecting SOAH, and the results of recent Surveys of Organizational Excellence conducted by the University of Texas School of Social Work.
- Met with representative of State Auditor's Office and Legislative Budget Board.
- Interviewed senior hearings management at agency, including Chief ALJ, Director of Hearings, an Assistants to the Director of Hearings.



**SUNSET REVIEW OF THE  
STATE OFFICE OF ADMINISTRATIVE HEARINGS**

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