The background of the cover is a photograph of the interior of the Texas State Capitol dome. The image shows a grand, circular space with multiple levels of galleries. The walls are white with ornate architectural details, including columns and decorative moldings. Several framed portraits of men are displayed on the lower level. The lighting is bright, highlighting the intricate details of the dome's interior.

# SUNSET ADVISORY COMMISSION

STAFF REPORT WITH FINAL RESULTS

*Texas Funeral Service Commission*

2018–2019  
86TH LEGISLATURE

# SUNSET ADVISORY COMMISSION

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# **TEXAS FUNERAL SERVICE COMMISSION**

**SUNSET STAFF REPORT WITH FINAL RESULTS**

**2018-2019**

**86TH LEGISLATURE**

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## ***HOW TO READ SUNSET REPORTS***

Each Sunset report is issued *three times*, at each of the three key phases of the Sunset process, to compile all recommendations and actions into one, up-to-date document. Only the most recent version is posted to the website. (**The version in bold is the version you are reading.**)

### 1. SUNSET STAFF EVALUATION PHASE

Sunset staff performs extensive research and analysis to evaluate the need for, performance of, and improvements to the agency under review.

**FIRST VERSION:** The *Sunset Staff Report* identifies problem areas and makes specific recommendations for positive change, either to the laws governing an agency or in the form of management directives to agency leadership.

### 2. SUNSET COMMISSION DELIBERATION PHASE

The Sunset Commission conducts a public hearing to take testimony on the staff report and the agency overall. Later, the commission meets again to vote on which changes to recommend to the full Legislature.

**SECOND VERSION:** The *Sunset Staff Report with Commission Decisions*, issued after the decision meeting, documents the Sunset Commission's decisions on the original staff recommendations and any new issues raised during the hearing, forming the basis of the Sunset bills.

### 3. LEGISLATIVE ACTION PHASE

The full Legislature considers bills containing the Sunset Commission's recommendations on each agency and makes final determinations.

**THIRD VERSION:** **The *Sunset Staff Report with Final Results*, published after the end of the legislative session, documents the ultimate outcome of the Sunset process for each agency, including the actions taken by the Legislature on each Sunset recommendation and any new provisions added to the Sunset bill.**

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# FINAL RESULTS



# FINAL RESULTS

## *House Bill 1540*

### Summary

The Texas Funeral Service Commission (TFSC) regulates individuals and businesses that provide funeral and death care services to protect the public from deceptive trade practices and ensure every person's final disposition is conducted professionally and ethically. Despite TFSC's limited resources, the Sunset Commission determined the agency largely achieves its licensing and regulatory functions and effectively monitors and enforces legal and professional standards for licensees. House Bill 1540 continues the agency for 12 years and includes other Sunset recommendations to standardize and formalize enforcement and licensing functions, remove several unnecessary licensing requirements and antiquated processes, and clarify the agency's authority to protect the public. The Sunset Commission also directed TFSC to better coordinate with the Department of State Health Services (DSHS) and to provide more comprehensive information to the public.

Generally, the Sunset Commission determined TFSC's regulation continues to serve a defined public interest. However, regulation of a small number of non-perpetual care cemeteries subject to state oversight is unnecessary to protect the public, and TFSC's involvement in private cemetery-related disputes is an unusual and unwarranted use of state resources. House Bill 1540 discontinues both and replaces the cemetery owner or operator member of the TFSC commission with a crematory owner or operator member to reflect the growing prevalence of cremation in the industry.

The following material summarizes results of the Sunset review of TFSC, including management actions directed to the agency that do not require legislative action.

### ISSUE 1 — *Enforcement*

**Recommendation 1.1, Modified** — Direct the agency to modify its memorandum of understanding with DSHS to include sanitation standards for funeral homes and death care businesses. (Management action – nonstatutory)

**Recommendation 1.2, Adopted** — Authorize TFSC to order refunds to consumers.

**Recommendation 1.3, Adopted** — Authorize the agency to seek injunctive relief through the attorney general to pursue unlicensed activity, and provide the agency clear statutory authority to take disciplinary action against a licensed funeral establishment, commercial embalming facility, or crematory that assists or allows an individual to engage in unlicensed activity, including practicing funeral directing or embalming without a license.

**Recommendation 1.4, Adopted** — Change the current statutory requirement that licensed funeral establishments and crematories be inspected at least once every two years to at least once every three years, and as a management action, direct the agency to establish a risk-based approach to inspections.

**Recommendation 1.5, Adopted** — Direct the agency to adopt rules for informal settlement conferences. (Management action – nonstatutory)

**Recommendation 1.6, Adopted** — Direct the agency to provide more detailed disciplinary information on its website. (Management action – nonstatutory)

**Recommendation 1.7, Modified** — Make complaints and other investigative information confidential and exempt from public disclosure, other than final enforcement actions. Authorize the agency to withhold the identity of non-testifying complainants, and as a management action, direct the agency to maintain complainants' confidentiality when possible.

**Recommendation 1.8, Adopted** — Direct the agency and DSHS to coordinate access to death certificate information for investigations. (Management action – nonstatutory)

## ISSUE 2 — *Licensing*

**Recommendation 2.1, Adopted** — Authorize TFSC to determine the criteria for preparation room exemptions.

**Recommendation 2.2, Modified** — Authorize TFSC to set license terms in rule and require TFSC to stagger renewals and prorate fees for licenses issued for less than a full term.

**Recommendation 2.3, Modified** — Remove outdated and unused licensure qualifications related to certain criminal convictions.

**Recommendation 2.4, Modified** — Provide TFSC general fee-setting authority to fully recover its costs and to set late payment penalty fees in rule.

**Recommendation 2.5, Adopted** — Direct TFSC to eliminate unnecessary notarization requirements. (Management action – nonstatutory)

**Recommendation 2.6, Adopted** — Direct the agency to accept all license applications and fee payments online. (Management action – nonstatutory)

**Recommendation 2.7, Adopted** — Direct the agency to make the consumer brochure freely available to licensees online. (Management action – nonstatutory)

**Recommendation 2.8, Adopted** — Direct TFSC to develop standard procedures for evaluating experience for military service members, military veterans, and military spouses. (Management action – nonstatutory)

**Recommendation 2.9, Adopted** — Direct TFSC to review and evaluate continuing education courses. (Management action – nonstatutory)

## ISSUE 3 — *Regulation of Cemeteries*

**Recommendation 3.1, Adopted** — Discontinue TFSC's regulation of non-perpetual care cemeteries.

**Recommendation 3.2, Adopted** — Replace the member of the TFSC commission who must be a cemetery owner or operator with a crematory owner or operator member.

**Recommendation 3.3, Adopted** — Direct the agency to discontinue its involvement in mediating private cemetery access disputes. (Management action – nonstatutory)

## ISSUE 4 — *Continue*

**Recommendation 4.1, Adopted** — Continue the Texas Funeral Service Commission for 12 years.

**Recommendation 4.2, Adopted** — Authorize TFSC to create advisory committees.

**Recommendation 4.3, Adopted** — Modify the agency's biennial reporting requirement to increase transparency.

**Recommendation 4.4, Modified** — Update the standard across-the-board requirement related to board member training, including a requirement for each TFSC member to attest to both receiving and reviewing the training manual annually.

## NEW RECOMMENDATIONS ADDED BY THE SUNSET COMMISSION

**Information on nontraditional disposition options, Adopted** — Direct the agency to provide information on nontraditional methods and options for the disposition of a body, such as cremation and green burials. (Management action – nonstatutory)

**Duplicate licenses, Adopted** — Authorize TFSC to issue duplicate licenses to license holders for the purposes of meeting the requirement to display their license at each place of business.

**Clarification of First Call and removal of a body, Modified** — Amend Texas Occupations Code, Section 651.401, to clarify a First Call occurs at the beginning of the relationship between a funeral director and a decedent's authorized family members, or qualified executors or administrators, to control the disposition of the decedent's remains, and to establish clear responsibility for when and how a funeral director directs the pickup or removal of a dead human body.

## Provision Added by the Legislature

**Licensure for out-of-state applicants** — Repeal unused authority to provisionally license out-of-state applicants, but maintain the agency's existing authority to issue reciprocal licenses to and waive prerequisites for out-of-state applicants.

## Fiscal Implication Summary

The Sunset Commission's recommendations will not have a significant fiscal impact. Discontinuing the regulation of non-perpetual care cemeteries, as enacted in House Bill 1540, will result in an annual loss of about \$500 in revenue currently collected from licensure fees.



———— **SUNSET COMMISSION DECISIONS**  
**NOVEMBER 2018**



# SUNSET COMMISSION DECISIONS

## Summary

The following material summarizes the Sunset Commission's decisions on the staff recommendations for the Texas Funeral Service Commission, as well as modifications and new recommendations raised during the public hearing.

The Texas Funeral Service Commission (TFSC) regulates individuals and businesses that provide funeral and death care services to protect the public from deceptive trade practices and ensure every person's final disposition is conducted professionally and ethically. Despite limited resources, TFSC largely achieves its licensing and regulatory functions and effectively monitors and enforces legal and professional standards for licensees, and the Sunset Commission recommends continuing the agency for 12 years. Other recommendations standardize and formalize enforcement and licensing functions by applying best practices, remove several unnecessary licensing requirements and antiquated processes, and clarify the agency's authority to protect the public. The Sunset Commission also found opportunities for TFSC to better coordinate with the Department of State Health Services and provide more, comprehensive information to the public.

Generally, the Sunset Commission determined TFSC's regulation continues to serve a defined public interest. However, regulation of a small number of non-perpetual care cemeteries subject to state oversight is unnecessary to protect the public, and TFSC's involvement in private cemetery-related disputes is an unusual and unwarranted use of state resources. The Sunset Commission recommends discontinuing both and replacing the cemetery owner or operator member of the TFSC commission with a crematory owner or operator member to reflect the growing prevalence of cremation in the industry.

## ISSUE 1

*The Agency's Enforcement Processes Cannot Ensure Fair Treatment of Licensees and Complainants.*

**Recommendation 1.1, Adopted as Modified** — Direct the agency to modify its MOU with DSHS to include sanitation standards for funeral homes and death care businesses. (Management action – nonstatutory)

**Recommendation 1.2, Adopted** — Authorize TFSC to order refunds to consumers.

**Recommendation 1.3, Adopted as Modified** — Authorize the agency to seek injunctive relief through the attorney general to pursue unlicensed activity, and provide the agency clear statutory authority to take disciplinary action against a licensed funeral establishment, commercial embalming facility, or crematory that assists or allows an individual to engage in unlicensed activity, including practicing funeral directing or embalming without a license.

**Recommendation 1.4, Adopted as Modified** — Change the current statutory requirement that licensed funeral establishments and crematories be inspected at least once every two years to at least once every three years, and as a management action, direct the agency to establish a risk-based approach to inspections.

**Recommendation 1.5, Adopted** — Direct the agency to adopt rules for informal settlement conferences. (Management action – nonstatutory)

**Recommendation 1.6, Adopted** — Direct the agency to provide more detailed disciplinary information on its website. (Management action – nonstatutory)

**Recommendation 1.7, Adopted as Modified** — Make complaints and other investigative information confidential and exempt from public disclosure, other than final enforcement actions such as agreed orders, and as a management action, direct the agency to maintain complainants' confidentiality when possible.

**Recommendation 1.8, Adopted** — Direct the agency and DSHS to coordinate access to death certificate information for investigations. (Management action – nonstatutory)

## ISSUE 2

### *Key Elements of the Agency's Licensing Functions Do Not Conform to Common Standards.*

**Recommendation 2.1, Adopted** — Authorize TFSC to determine the criteria for preparation room exemptions.

**Recommendation 2.2, Adopted** — Authorize TFSC to set license terms in rule.

**Recommendation 2.3, Adopted** — Remove outdated and unused licensure qualifications.

**Recommendation 2.4, Adopted** — Provide TFSC general fee-setting authority to fully recover its costs.

**Recommendation 2.5, Adopted** — Direct TFSC to eliminate unnecessary notarization requirements. (Management action – nonstatutory)

**Recommendation 2.6, Adopted** — Direct the agency to accept all license applications and fee payments online. (Management action – nonstatutory)

**Recommendation 2.7, Adopted** — Direct the agency to make the consumer brochure freely available to licensees online. (Management action – nonstatutory)

**Recommendation 2.8, Adopted** — Direct TFSC to develop standard procedures for evaluating experience for military service members, military veterans, and military spouses. (Management action – nonstatutory)

**Recommendation 2.9, Adopted** — Direct TFSC to review and evaluate continuing education courses. (Management action – nonstatutory)

## ISSUE 3

### *The Agency's Regulation of Cemeteries Is Not Necessary to Protect the Public.*

**Recommendation 3.1, Adopted** — Discontinue TFSC's regulation of non-perpetual care cemeteries.

**Recommendation 3.2, Adopted as Modified** — Replace the member of the TFSC commission who must be a cemetery owner or operator with a crematory owner or operator member.

**Recommendation 3.3, Adopted** — Direct the agency to discontinue its involvement in mediating private cemetery access disputes. (Management action – nonstatutory)

## ISSUE 4

*Texas Has a Continuing Need for the Texas Funeral Service Commission, but Opportunities Exist to Improve Public Participation.*

**Recommendation 4.1, Adopted** — Continue the Texas Funeral Service Commission for 12 years.

**Recommendation 4.2, Adopted** — Authorize TFSC to create advisory committees.

**Recommendation 4.3, Adopted** — Modify the agency’s biennial reporting requirement to increase transparency.

**Recommendation 4.4, Adopted** — Update the standard across-the-board requirement related to commission member training.

## ADOPTED NEW RECOMMENDATIONS

### Information on Nontraditional Disposition Options

Direct the agency to provide information on nontraditional methods and options for the disposition of a body, such as cremation and green burials. (Management action – nonstatutory)

### Duplicate Licenses

Authorize TFSC to issue duplicate licenses to license holders for the purposes of meeting the requirement to display their license at each place of business.

### Clarification of First Call and Removal of a Body

Amend Texas Occupations Code, Section 651.401, to clarify the distinction between a first call, when a consumer initially makes contact with a funeral home to arrange for the disposition of a body, and the removal of a body, solely in relation to transportation.

## Fiscal Implication Summary

Overall, the Sunset Commission’s recommendations would not have a significant fiscal impact. The recommendation to discontinue state regulation of five non-perpetual care cemeteries would result in an annual loss of about \$500 in revenue currently collected from licensure fees.



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**SUMMARY OF SUNSET  
STAFF RECOMMENDATIONS**



# SUMMARY

More than 192,000 people died in Texas in 2016 — about 540 each day.<sup>1</sup> State regulation of the funeral and death care industry has always focused on the health and welfare of the living. However, this regulation is inseparable from the cultural, spiritual, and religious contexts that surround an individual's final disposition. The Texas Funeral Service Commission (TFSC) regulates about 4,500 individuals and 1,600 businesses that provide funeral and death care services to protect the public from deceptive trade practices and ensure every person's final disposition is conducted professionally and ethically.

In 1999, TFSC was struggling to manage its internal operations, let alone fulfill basic regulatory duties. The Sunset review in 2001 affirmed the seriously defective state of the agency, but, following a two-year probationary period, the Sunset Commission and Legislature determined to give the agency an opportunity to change. Since that time, stable leadership and guidance have turned the agency around. Sunset staff found that despite limited resources, TFSC largely achieves its licensing and regulatory functions, and effectively monitors and enforces legal and professional standards for licensees. With the agency now on the right track, the Sunset review focused on the changes pertinent to the agency's future success. As with other occupational licensing agencies, Sunset staff considered if the agency's processes could benefit from applying standard best practices in enforcement and licensing functions. For example, the agency lacks key enforcement tools for protecting consumers who have been financially defrauded, and several unnecessary licensing requirements and antiquated processes limit the agency's ability to modernize its operations.

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*Despite limited resources, TFSC largely achieves its mission.*

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Sunset staff also considered and determined TFSC's regulation continues to serve a defined public interest. Although the same public health concerns that initiated regulation of embalmers in 1903 have lessened, TFSC continues to protect consumers through its regulation of funeral directors, embalmers, and death care service businesses — funeral homes, commercial embalming facilities, and crematories. However, TFSC's regulation of a small number of non-perpetual care cemeteries subject to state oversight is unnecessary to protect the public, and involvement in private cemetery-related disputes is an unusual and unwarranted use of state resources.

Finally, Sunset staff considered organizational alternatives to regulating the funeral and death care industry, including consolidating TFSC's functions within other regulatory agencies. However, the review found TFSC cooperates well with other state agencies involved in the funeral and death care industry, such as the Texas Department of Insurance and Texas Department of Banking, avoiding duplication. Also, the agency does not demonstrate any significant

structural or functional problems. Ultimately, Sunset staff determined any potential benefits from transferring or merging the agency's functions would be limited and do not justify changes at this time.

The following material summarizes Sunset staff recommendations on the Texas Funeral Service Commission.

## Issues and Recommendations

### *Issue 1*

#### **The Agency's Enforcement Processes Cannot Ensure Fair Treatment of Licensees and Complainants.**

A regulatory agency should have clear procedures and rules for conducting inspections that address public safety concerns and promote fair treatment and timely compliance of regulated entities. While the agency conducts inspections annually for most funeral and death care service businesses, the review found the agency does not have a risk-based inspection process to prioritize inspections that pose the greatest risk to the public and lacks objective guidelines for evaluating sanitation requirements. Also, a lack of established procedures and some nonstandard enforcement practices affect the fair and efficient resolution of complaints. Finally, providing the agency additional enforcement tools, such as refund authority and access to death records information, and posting more detailed disciplinary history on the agency's website, would help better protect consumers.

#### **Key Recommendations**

- Require TFSC, along with the Department of State Health Services, to establish and enforce sanitation standards for funeral establishments and death care service businesses and coordinate access to death records information.
- Authorize TFSC to order refunds to consumers.
- Direct the agency to establish a risk-based, biennial approach to inspections.
- Direct the agency to adopt rules for informal settlement conferences.
- Direct the agency to provide more detailed disciplinary information on its website.

### *Issue 2*

#### **Key Elements of the Agency's Licensing Functions Do Not Conform to Common Standards.**

In reviewing the agency's licensing functions, the review found certain processes do not match model standards or common practices observed through Sunset staff's experience reviewing regulatory agencies. Specifically, some licensure requirements are overly restrictive, such as prescriptive business requirements for preparation rooms and burdensome annual renewal periods, creating barriers to licensure. Additionally, the agency has not modernized its licensing processes and currently does not accept applications or initial licensing fees online. Several licensing provisions in the agency's statute, rules, and procedures

are also atypical and could potentially affect the fair and effective treatment of licensees, like informal procedures for crediting military experience and a lack of review of continuing education courses.

### **Key Recommendations**

- Authorize TFSC to determine the criteria for preparation room exemptions.
- Direct TFSC to develop standard procedures for evaluating experience for military service members, military veterans, and military spouses.
- Provide TFSC general fee-setting authority to fully recover its costs, and direct the agency to accept all license applications and fee payments online.
- Direct TFSC to review and evaluate continuing education courses.

## ***Issue 3***

### **The Agency's Regulation of Cemeteries Is Not Necessary to Protect the Public.**

In 2001, TFSC received authority to regulate non-exempt, non-perpetual care cemeteries, which totaled only five of the estimated 50,000 cemeteries in Texas in fiscal year 2017. Sunset staff found regulation of these cemeteries is no longer needed and should be discontinued. Existing criminal laws better protect consumers from fraudulent cemetery practices, and enforcement and complaint data has not shown any meaningful action taken against the few cemeteries within the agency's jurisdiction. Further, Sunset staff identified that there is no need for the agency to play a role in cemetery access mediations, which unnecessarily expends state resources in resolving private disputes.

### **Key Recommendations**

- Discontinue TFSC's regulation of non-perpetual care cemeteries.
- Replace the member of the TFSC commission who must be a cemetery owner or operator with a public member.
- Direct the agency to discontinue its involvement in mediating cemetery access disputes.

## ***Issue 4***

### **Texas Has a Continuing Need for the Texas Funeral Service Commission, but Opportunities Exist to Improve Public Participation.**

Regulation of the funeral and death care service industry by TFSC continues to serve a meaningful public interest by ensuring funeral directors, embalmers, and death care businesses provide professional and ethical services to consumers. Sunset staff concluded that no substantial benefits would result from changes to TFSC's organizational structure or from merging TFSC's various functions, but identified opportunities to improve public participation in and transparency of the agency's operations.

### **Key Recommendations**

- Continue the Texas Funeral Service Commission for 12 years.
- Modify the agency's biennial reporting requirement to increase transparency by reporting on licensing, inspection, enforcement, and other activities.

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<sup>1</sup> “Compressed Mortality File 1999–2016 on CDC WONDER Online Database, released June 2017,” Centers for Disease Control and Prevention, National Center for Health Statistics, Compressed Mortality File 1999–2016 Series 20 No. 2U, 2016, as part of the Vital Statistics Cooperative Program, last accessed July 17, 2018, <http://wonder.cdc.gov/cmfi10.html>.

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**AGENCY AT A GLANCE**

**AUGUST 2018**



# AGENCY AT A GLANCE

Originally established in 1903 as the State Board of Embalming, today, the Texas Funeral Service Commission's (TFSC) mission is to protect the public from deceptive practices in the funeral and death care industry and to guarantee that every person's final disposition is conducted professionally and ethically. To fulfill this mission, the agency carries out the following key activities:

- Licenses funeral directors and embalmers, and ensures compliance with continuing education requirements
- Inspects and licenses funeral homes, commercial embalming facilities, crematories, and certain cemeteries
- Investigates and resolves complaints, and takes disciplinary action when necessary to enforce the agency's statutes and rules

## Key Facts

- **Governance.** The Texas Funeral Service Commission consists of seven members appointed by the governor, with the advice and consent of the Senate. Members serve staggered, six-year terms and oversee the agency's operations and policies. The commission includes four public members, two members dual-licensed as an embalmer and a funeral director, and one member registered as a cemetery owner or operator, as shown in the chart, *Texas Funeral Service Commission Members*. The governor designates the presiding officer for a three-year term, which rotates between a public member and an industry member. The commission selects an assistant presiding officer from its public members for a one-year term.

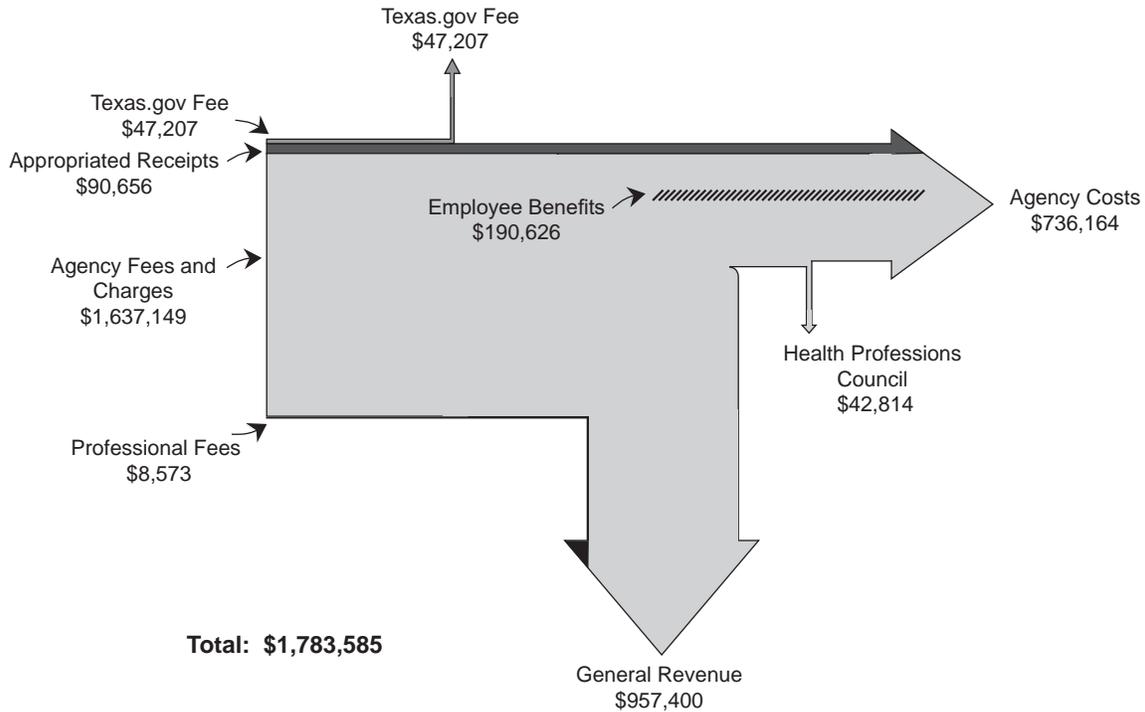
### *Texas Funeral Service Commission Members*

Member	Term	Qualification
Jean Olinger, Presiding Officer	2012–2019	Public Member
Larry Allen, Assistant Presiding Officer	2015–2021	Public Member
Greg Compean	2015–2021	Funeral Director and Embalmer
Dianne Hefley	2017–2023	Public Member
Jonathan Scepanski	2013–2019	Public Member
Gary Shaffer	2013–2019	Funeral Director and Embalmer
Kristin Tips	2017–2023	Cemetery Owner

- **Funding.** In fiscal year 2017, the agency's revenue totaled almost \$1,784,000, including about \$1,671,000 from license fees. Additional revenue came from appropriated receipts, including almost \$76,000 from sales of the agency's law book and funeral consumer brochure. The agency transferred more than \$957,000 in excess of its appropriation to the General Revenue Fund. The chart on the following page, *Flow of Texas Funeral Service Commission Revenue and Expenditures*, shows the overall impact of agency revenues and expenditures in fiscal year 2017. The pie chart, *Texas Funeral*

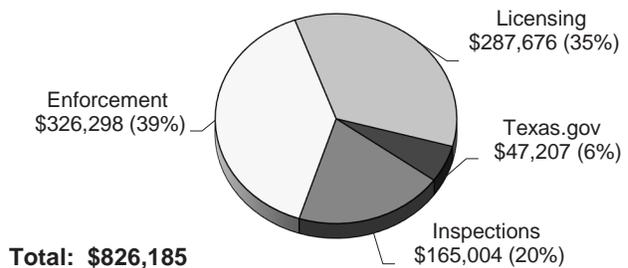
*Service Commission Expenditures*, shows how the agency spent its appropriation of about \$826,000. Appendix A describes the agency’s use of historically underutilized businesses in purchasing goods and services for fiscal years 2015 to 2017.

**Flow of Texas Funeral Service Commission  
Revenues and Expenditures – FY 2017**



- **Staffing.** In fiscal year 2017, the agency employed 11 full-time employees. All TFSC employees are based out of the agency’s office in downtown Austin, but two staff members travel throughout the state to conduct inspections. The agency is a member of the Health Professions Council, which provides information technology staffing for the agency and other health professional licensing agencies. Because of the agency’s small size, Sunset staff did not prepare an analysis comparing the agency’s workforce composition to the overall civilian labor force.

**Texas Funeral Service Commission  
Expenditures – FY 2017**



- **Licensing.** The agency licenses funeral directors and embalmers, as well as funeral homes, commercial embalming facilities, crematories, and certain cemeteries, described in the table on the following page, *Licenses by Type*. In fiscal year 2017, the agency licensed almost 4,500 individuals and 1,600 businesses and cemeteries. To be licensed as a funeral director or embalmer, individuals must be at least 18 years old; be a graduate from an accredited school or college of mortuary science; pass both the Mortuary Law Exam and a proficiency exam; and complete a provisional license program. The provisional program requires individuals be employed at a funeral home or commercial embalming facility and complete 45 cases of either funeral directing or embalming for the respective license

type under the direct supervision of a licensee. In fiscal year 2017, 279 individuals held provisional funeral director licenses and 208 held embalmer licenses, although the same individual may hold both provisional licenses simultaneously.

### ***Licenses by Type – FY 2017***

<b>License Type</b>	<b>Description</b>	<b>Active Licenses</b>
Funeral Director	An individual responsible for caring for and preparing dead human bodies for final disposition.	1,045*
Embalmer	An individual trained to use chemicals, fluids, and gases to disinfect and preserve a body.	61*
Dual-licensed	An individual who holds both a funeral director license and an embalmer license.	3,364*
Funeral Home	A business involved in the care and preparation of bodies for burial.	1,376
Commercial Embalming Facility	A business that embalms human bodies for funeral homes.	51
Crematory	A business operating a furnace used for the cremation of human remains.	164
Cemetery	A place used for internment, including a graveyard, burial park, or mausoleum.	5

\*As of May 3, 2018.

All funeral and death care service businesses must pass an initial inspection and submit price lists for goods or services to obtain a license. Funeral homes, commercial embalming facilities, and crematories must also submit local fire and health inspection certificates. Funeral homes and commercial embalming facilities must designate a funeral director or an embalmer in charge, who is ultimately responsible for overseeing regulated practices performed at the business. Crematories must submit verification of air quality control permits issued by the Texas Commission on Environmental Quality and affidavits of certification for crematory operators.

- **Consumer Protection.** The Federal Trade Commission (FTC) is heavily involved in the funeral services industry, particularly as to the interactions between funeral directors and consumers. The FTC’s “Funeral Rule” establishes certain unfair or deceptive acts or practices and protects consumers’ right to only pay for the services and goods desired.<sup>1</sup> Texas, like most states, reflects provisions of the Funeral Rule in its statute and rules.<sup>2</sup> For example, the Funeral Rule requires funeral directors to provide a price list of caskets offered for purchase.<sup>3</sup> Texas statute requires not only that casket prices be listed, but that the least expensive casket offered by a funeral home be available to view in full size at the establishment.<sup>4</sup>
- **Cemetery Regulation.** The agency licenses, conducts limited inspections of, and investigates complaints regarding a few non-perpetual care cemeteries. The textbox, *Cemeteries in Texas*, explains the difference

#### ***Cemeteries in Texas***

Cemeteries are categorized into two groups:

- Perpetual care cemeteries provide for ongoing maintenance of cemetery grounds using proceeds from associated trust funds. The Texas Department of Banking regulates perpetual care cemeteries.
- Non-perpetual care cemeteries have no associated trust funds. Most non-perpetual care cemeteries are locally owned or maintained by families, municipalities, religious organizations, or similar entities, and are exempted from state oversight.

between perpetual and non-perpetual care cemeteries. Most non-perpetual care cemeteries are exempt from state regulation, because they are smaller or affiliated with an unincorporated association, a church or religious society, or are public and state, county, or municipally owned.<sup>5</sup> As a result of these exemptions, TFSC licensed only five cemeteries in fiscal year 2017. Regulation by TFSC is minimal and consists of an initial inspection, primarily focused on the cemetery's record-keeping, public access, and operations, followed by additional inspections if an interment has occurred within two years or if the agency receives a complaint. The agency receives few complaints regarding cemeteries and forwards most of these to other responsible agencies, such as the Texas Department of Banking.

- **Enforcement.** The agency ensures compliance with statute and rules by inspecting all funeral homes, commercial embalming facilities, and crematories prior to licensure and annually thereafter. The agency also investigates complaints against licensees to protect the public. The table *TFSC Enforcement Activities*, provides more detail regarding the inspections and investigations conducted by the agency. In fiscal year 2017, the agency resolved complaints in 79 days, on average. The most common type of violation involved service issues at funeral establishments, like incorrect death certificate information, embalming without permission, or untimely returning cremated remains to families.

#### ***TFSC Enforcement Activities – FY 2017***

	<b>Funeral Homes</b>	<b>Commercial Embalming Facility</b>	<b>Crematory</b>	<b>Cemetery</b>	<b>Individual</b>	<b>Total</b>
<b>Inspections by License Type</b>						
Pre-licensure	55	0	4	0	—	<b>59</b>
Annual	1,091	26	58	2	—	<b>1,177</b>
<b>Total</b>	<b>1,146</b>	<b>26</b>	<b>62</b>	<b>2</b>	<b>—</b>	<b>1,236</b>
Businesses with Violations	304	5	2	2	—	<b>313</b>
Violations Found	550	6	2	2	—	<b>560</b>
<b>Sources of Complaints by License Type</b>						
Consumer	107	0	1	19	9	<b>136</b>
Agency	33	0	0	0	0	<b>33</b>
Other	10	0	0	0	3	<b>13</b>
<b>Total</b>	<b>150</b>	<b>0</b>	<b>1</b>	<b>19</b>	<b>12</b>	<b>182</b>
<b>Action Taken by License Type</b>						
Dismissed	3	0	0	5	1	<b>9</b>
Closed – No Violation	105	0	1	0	6	<b>112</b>
Referred to other agency	13	0	0	14	1	<b>28</b>
Administrative Penalty	20	0	0	0	3	<b>23</b>
Warning Letter	5	0	0	0	0	<b>5</b>
Suspension	0	0	0	0	1	<b>1</b>
Other	4	0	0	0	0	<b>4</b>
<b>Total</b>	<b>150</b>	<b>0</b>	<b>1</b>	<b>19</b>	<b>12</b>	<b>182</b>

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<sup>1</sup> 15 U.S.C. Chapter 57a(a); 15 U.S.C. Chapter 46(g); and 16 C.F.R. Part 453.

<sup>2</sup> All citations to Texas statutes are as they appear on <http://www.statutes.legis.texas.gov/>. Sections 651.405–.4065, 651.454–.455, 651.457, and 651.459–.460, Texas Occupations Code.

<sup>3</sup> 16 C.F.R. Section 453.2(a).

<sup>4</sup> Sections 651.405 and 651.351(d)(7) and (f), Texas Occupations Code; 22 T.A.C. Section 203.25.

<sup>5</sup> Section 651.353(d), Texas Occupations Code.



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**ISSUES**



# ISSUE 1

## *The Agency's Enforcement Processes Cannot Ensure Fair Treatment of Licensees and Complainants.*

### Background

The Texas Funeral Service Commission (TFSC) enforces laws and rules related to the funeral and death care industry, including conducting pre-licensure and annual inspections of funeral homes, commercial embalming facilities, and crematories. The agency also investigates complaints and, as necessary, takes disciplinary action for violations of statute or rule against these businesses, as well as funeral directors and embalmers, and a few cemeteries. The agency employs two inspectors and two investigators and devotes almost 60 percent of its budget to conducting inspections and investigations. In fiscal year 2017, the agency inspected 1,236 funeral and death care service businesses and investigated 182 complaints.

The Sunset Advisory Commission has a long history of evaluating licensing and regulatory agencies, asking not only if the functions of an agency continue to be needed, but also whether the agency is performing those functions in the most effective, fair, and efficient manner. Over the course of more than 40 years, the Sunset Commission has completed more than 110 licensing agency reviews. Sunset staff has documented standards in reviewing licensing programs to guide future reviews of licensing agencies. While these standards provide a guide for evaluating a licensing program's structure, they are not intended for blanket application. Sunset staff continues to refine and develop standards, reflecting additional experience and different or changing needs, circumstances, or practices in licensing agencies. The following material highlights areas where the agency's statute, rules, and procedures differ from these model standards and describes the potential benefits of conforming to standard enforcement practices.

### Findings

#### **The agency's inspection process does not best address the highest risks to public safety.**

- **Gaps in enforcing sanitation requirements.** An agency should have clear procedures and rules for conducting inspections that address public safety concerns and promote fair treatment and timely compliance of regulated entities. Statute requires TFSC and the Department of State Health Services (DSHS) to enter into a memorandum of understanding (MOU) outlining each agency's responsibilities in inspecting and enforcing sanitation requirements created under the Solid Waste Disposal Act.<sup>1</sup> However, the existing MOU does not address these duties.<sup>2</sup> DSHS has established standards for disposing of waste, like blood or body fluids, and related sanitation requirements, but TFSC has not incorporated these standards into its inspection process, leaving a gap in enforcement and creating potential public health risks for death care business employees and others.

Further, during an inspection of a funeral home, TFSC inspectors must note whether the preparation room is clean and sanitary, but the agency does not have any standards or guidelines for evaluating sanitation, introducing

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*TFSC has not incorporated DSHS sanitation standards into its inspection process.*

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subjectivity into the inspection and enforcement process, and possibly overlooking poor sanitation practices. In the last 10 years, the agency has taken only one enforcement action against a funeral home for a sanitation violation. Clarifying the agency's responsibility for enforcing existing DSHS requirements, and creating objective standards to judge sanitation, would ensure funeral homes are evaluated for their compliance with state sanitation regulations in a fair and consistent manner.

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*The agency does not prioritize high-risk inspections.*

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- **Inefficient inspection procedures.** An agency should have processes in place to evaluate the risk level posed by entities and individuals subject to inspection and target most staff time and resources to the highest risk areas. Statute directs TFSC to establish criteria for inspections based on risk and only requires funeral and death care service businesses be inspected once every two years.<sup>3</sup> However, in practice, the agency does not have a process to prioritize inspections that pose the greatest risk to the public and instead conducts annual inspections of businesses based on their geographic location to allow its two inspectors to complete multiple inspections in the same area more efficiently. These inspections can take as little as 15 minutes, calling into question the thoroughness of the process. In contrast, a risk-based approach to inspections allows agencies to focus resources on ensuring businesses or activities with the highest risk to the public receive necessary attention. Shifting the agency's focus to inspecting high-risk businesses would allow the agency to focus on protecting the public and maximize its limited inspection resources.

### **Insufficient enforcement tools reduce the agency's effectiveness in protecting consumers.**

- **No refund authority.** Some regulatory agencies can order refunds instead of or in addition to imposing an administrative penalty or other sanction on licensees. Refunds can be granted when a consumer has been defrauded or subjected to a loss that can be quantified, such as insurance proceeds due to a family after a funeral has been paid for. Currently, TFSC does not have statutory authority to order a licensee to pay a refund to a consumer, even though many of the complaints it receives involve financial disputes between families and funeral service providers regarding the services charged for and actually received. In these instances, the ability to grant a refund would give the agency an additional enforcement tool to help make consumers who have been defrauded whole again.
- **Lack of authority to fully counter unlicensed activity.** The enforcement process should allow an agency to quickly address unlicensed activity of a regulated industry or profession to maintain the integrity of the regulation. Statute currently authorizes TFSC to seek injunctive relief against licensees for violations of applicable laws or commission rules, but not against unlicensed individuals.<sup>4</sup> Although the agency does reach out to district and county attorneys to prosecute unlicensed activity, which is a Class B misdemeanor, the agency more often relies on unclear authority to

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*Refund authority would help make defrauded consumers whole.*

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issue cease and desist letters to individuals practicing funeral directing or embalming without a license.<sup>5</sup> Local attorneys are generally receptive to pursuing these cases; however, in larger metropolitan areas, these activities are sometimes less likely to be taken on by local authorities and may not take as high of a priority. Clarifying statute to allow the agency to seek injunctive relief through the office of the attorney general against anyone who violates applicable statute or rules would more effectively address unlicensed activity.

### **Nonstandard and undefined enforcement practices could affect the fair and efficient resolution of complaints.**

- **Unclear complaint resolution process.**

Lack of established procedures. A licensing agency's entire complaint process should be guided by clear rules, including any informal complaint settlement procedures. Formal hearings often require significant time and expense for both the agency and licensees, but other, informal means of resolving cases can reduce costs and still achieve a fair outcome that protects consumers and the public. The form of these informal processes varies but is usually established in rules.<sup>6</sup> TFSC has developed an informal mediation process to settle complaints but has not established this process in rule.<sup>7</sup> Further, Sunset staff reviewed TFSC enforcement files and found gaps in chronicling critical components of these cases and documentation of correspondence, particularly in the agency's informal hearings. Establishing the agency's informal hearing process in rule, and requiring all phases of the complaint investigation and resolution process be documented, helps ensure appropriate and consistent action by the agency, protecting both the public and licensees.

Insufficient complainant involvement. Statute entitles a complainant to attend any proceeding resulting from a complaint filed at TFSC.<sup>8</sup> The agency conducts informal telephonic mediations with respondent licensees to resolve complaints and negotiate penalties, but this process does not provide a means for the complainant to be involved. Currently, complainants may be consulted during the complaint investigation and are informed of the general disposition of the case, but do not have the opportunity to participate in informal mediations or other hearings, or learn the full details of the complaint's resolution. Providing complainants the opportunity to participate in the entire complaint resolution process would ensure that complainants are informed throughout the entirety of the complaint resolution process.

- **Lack of public disciplinary history.** Regulatory agencies exist to protect the public, and the public should have access to general information about the professions under the agency's jurisdiction. The agency maintains information on licensees' disciplinary history, including past violations, complaints received, and resulting enforcement actions, but does not provide licensees' complete disciplinary histories to the public. The agency's

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*Sunset found gaps in chronicling critical components of complaint cases.*

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website allows the public to search for licensees and see past disciplinary actions, but does not explain details of why a licensee was sanctioned. For example, the website may show a funeral establishment entered into an agreed order but does not include what violations occurred or what enforcement was taken. Allowing the public to see the details of licensees' disciplinary history would give consumers the ability to make more informed decisions about their funeral and death care service providers, particularly in times of emotional distress.

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*Providing more detailed disciplinary information online would help consumers make more informed decisions.*

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- **Limited complaint confidentiality.** To the extent possible, licensing agencies should protect the identity of complainants. When investigating complaints, TFSC sends a copy of the complaint directly to the licensee for response. The agency redacts the complainant's contact information, but not their name, potentially discouraging people, including funeral establishment employees, from filing legitimate complaints out of fear of retaliation. While licensees may find out the identify of the complainant as the investigation process proceeds, agencies should do their best to protect the identity of complainants for as long as possible to reduce the reluctance of consumers or other licensees in filing complaints.
- **Access to needed death records information.** Agencies should coordinate regulatory activities with other agencies that have overlapping responsibilities or interests. Several agencies play a role in regulating the funeral and death care industry, including TFSC, Texas Department of Insurance, Texas Department of Banking, and DSHS. Statute requires TFSC and DSHS to enter into a MOU outlining each agency's responsibility in enforcing death record requirements that affect funeral homes.<sup>9</sup> Funeral directors are primarily responsible for initiating the process to complete death certificate filing, including getting a physician's signature.<sup>10</sup> DSHS maintains the Vital Statistics Unit electronic death registration system, which houses information relating to death certificates, and is ultimately responsible for their distribution to families.

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*The agency cannot view if or when a death certificate is filed, delaying complaint resolution.*

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TFSC receives numerous complaints related to the untimely distribution of death certificates, which can prevent families from filing for life insurance, closing bank accounts, and addressing other end-of-life matters. Funeral directors have access to the state's death records registration system for use in completing death certificates.<sup>11</sup> However, the agency does not have similar access to the state's system or even the ability to view if or when a certificate has been filed by a funeral director. When TFSC receives these complaints, investigators must reach out to DSHS employees to request the status of the death certificate in question, but this ad hoc process is cumbersome for the agency and families awaiting responses. Coordinating access to the registration system with DSHS could allow TFSC to more efficiently respond to consumer inquiries and complaints, freeing up staff at both agencies and helping consumers.

## Recommendations

### *Change in Statute*

#### **1.1 Require the MOU between TFSC and DSHS to include sanitation standards for funeral homes and death care businesses.**

This recommendation would require TFSC and DSHS to revise their existing MOU to establish objective enforcement standards for sanitation in funeral homes, as well as require TFSC to adopt rules to reflect these revisions. The agencies could use sanitation standards already established by DSHS for other facilities or collaborate with stakeholders to develop unique standards for TFSC licensees. In implementing this recommendation, the agencies should clarify the responsibility to enforce the standards developed under the MOU and applicable standards already required in statute or DSHS rule, and ensure individuals responsible for conducting inspections are properly trained.

#### **1.2 Authorize TFSC to order refunds to consumers.**

This recommendation would authorize the agency to require a licensee to issue a refund to a consumer. The amount of the refund could not exceed the amount the consumer paid to the license holder, without inclusion of any additional consideration of damages or harm. Any requirement to issue a refund may be in lieu of or in addition to other sanctions ordered against a licensee. This recommendation would also direct the agency to consider revising its penalty matrix to account for this authority. This recommendation would allow TFSC to take more effective action when consumer harm can be quantified and offer relief to consumers without the need for separate civil court action to recover these amounts.

#### **1.3 Authorize the agency to use injunctive relief through the attorney general for unlicensed activity.**

This recommendation would clarify statute to authorize the agency to seek injunction relief against unlicensed individuals through the attorney general's office. This recommendation would clarify the agency's authority to address unlicensed activity and maintain the integrity of the funeral and death care industry.

### *Management Action*

#### **1.4 Direct the agency to establish a risk-based, biennial approach to inspections.**

This recommendation would direct the agency to develop rules to formally guide the prioritization of inspections based on risk to consumer welfare. In establishing these rules, the agency could consider past or repeat violations, recent complaints, negative media attention, or other indications of increased risks. In developing inspection priorities, the agency could also consider if less onerous desk-audits of records would suffice for low-risk inspections. Establishing a risk-based approach for inspections would ensure the most efficient allocation of resources toward the highest risks to the public. While the agency already has statutory authority to conduct biennial inspections, this recommendation would also direct the agency to use this authority to implement a biennial inspection schedule. Inspecting establishments every two years would allow the agency to perform more thorough inspections for violations or businesses that pose the greatest risks and reduces pressure on its two inspectors to meet an ambitious quota of inspections each year.

### **1.5 Direct the agency to adopt rules for informal settlement conferences.**

This recommendation would direct the agency to adopt rules outlining its informal complaint resolution process and require complete documentation of each step of the process. This recommendation would also direct the agency offer complainant attendance in informal settlement conferences. Clear rules and procedures, and improved documentation of these informal conferences, would help ensure appropriate and consistent action by the agency and involvement by complainants.

### **1.6 Direct the agency to provide more detailed disciplinary information on its website.**

This recommendation would increase transparency and improve the ability of consumers to make informed decisions about funeral and death care service providers by providing access to complete disciplinary information. Under this recommendation, the agency would post more detailed information regarding disciplinary history on its website, including full versions of any finalized agreed orders and disciplinary actions taken against licensees.

### **1.7 Direct the agency to maintain complainants' confidentiality when possible.**

This recommendation would direct the agency to protect the identity of complainants to the extent possible, while ensuring licensees still have access to all necessary information to fully respond to complaints. To accomplish this recommendation, the agency could consider summarizing the complaint allegations or redacting copies of complaints when providing notice of a complaint to respondents. By better protecting complainants' identities, this recommendation would make the public and others more comfortable filing complaints without fear of retaliation.

### **1.8 Direct the agency and DSHS to coordinate access to death certificate information for investigations.**

This recommendation would direct TFSC and DSHS to coordinate access to information in the state's death registration system to expedite investigations regarding death certificates. The agencies should work together to define the information needed by TFSC to fulfill its investigatory functions and develop a system to timely and reliably provide that information to TFSC. The agencies have an existing MOU regarding enforcement of Chapter 193, Texas Health and Safety Code, for death records and could modify the terms of that MOU if necessary.<sup>12</sup>

## **Fiscal Implication**

These recommendations would not have a significant fiscal impact to the state or the agency. The recommendation to direct the agency to inspect establishments biennially, through a risk-based process, would reduce the number of inspections conducted each year, but each inspection is expected to be more robust to fully ensure standards set by TFSC are being met.

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- 1 All citations to Texas statutes as they appear on <http://www.statutes.legis.texas.gov/>. Section 651.160, Texas Occupations Code.
- 2 22 T.A.C. Section 201.16.
- 3 Section 651.157, Texas Occupations Code.
- 4 Section 651.601, Texas Occupations Code.
- 5 Section 651.602, Texas Occupations Code.
- 6 *See* 22 T.A.C. Section 281.22 (Texas State Board of Pharmacy).
- 7 22 T.A.C. Section 203.42 outlines the agency’s notice and hearing process but merely mentions informal methods of settling complaints without further detail or explanation.
- 8 Section 651.202(f), Texas Occupations Code.
- 9 Section 651.160, Texas Occupations Code; 22 T.A.C. Section 201.16.
- 10 Section 193.002, Texas Health and Safety Code.
- 11 Section 193.002, Texas Health and Safety Code; 25 T.A.C. Sections 181.2 and 181.14.
- 12 Section 651.160, Texas Occupations Code; 22 T.A.C. Section 201.16.



# ISSUE 2

## *Key Elements of the Agency's Licensing Functions Do Not Conform to Common Standards.*

### Background

The Texas Funeral Service Commission (TFSC) issues and renews licenses for individuals and businesses that provide funeral and death care services, and oversees a robust provisional program that ensures future funeral directors and embalmers are appropriately trained. In fiscal year 2017, the agency regulated almost 4,500 individuals, 500 provisional licensees, and 1,600 businesses, as shown in the table, *TFSC Licensees*.

The Sunset Advisory Commission has a long history evaluating licensing functions, as the increase of occupational licensing programs served as an impetus behind the creation of the commission in 1977. Since then, the Sunset Commission has completed more than 110 licensing agency reviews. Sunset staff has documented standards in reviewing licensing programs to guide future reviews of licensing agencies. While these standards provide a guide for evaluating a licensing program's structure, they are not intended for blanket application. Sunset staff continues to refine and develop standards, reflecting additional experience and different or changing needs, circumstances, or practices in licensing agencies. The following material highlights areas where TFSC's statute, rules, and procedures differ from these model standards and describes the potential benefits of conforming to standard practices.

**TFSC Licensees – FY 2017**

License Type	Number
Dual-licensed Funeral Director and Embalmer	3,364
Funeral Director (only)	1,045
Embalmer (only)	61
<b>Total Individuals*</b>	<b>4,470</b>
Provisional Funeral Director	279
Provisional Embalmer	208
<b>Total Provisional*</b>	<b>487</b>
Funeral Home	1,376
Crematory	164
Commercial Embalming Facility	51
Cemetery	5
<b>Total Businesses</b>	<b>1,596</b>

\*As of May 3, 2018.

### Findings

#### **Overly restrictive licensure requirements and outdated processes create barriers to licensure and reduce the efficiency of agency operations.**

- **Burdensome licensure requirements.** Qualifications for licensure should not arbitrarily overburden applicants or create unreasonable barriers to entering a profession.

Outdated and restrictive business requirements. Requirements for licensure should be related to the practice of a profession. Statute requires every funeral home to maintain a separate preparation room and equipment for embalming, regardless of whether embalming occurs at the location.<sup>1</sup> While many funeral homes provide embalming services, others do not for business,

### **Preparation Room Exemption Requirements**

The agency may exempt a funeral home from the preparation room requirement if:

- the funeral home is located within 50 miles of a facility at which the embalming services may be performed;
- both the funeral home and the facility are under the same ownership; and
- no embalming will occur at the exempt funeral home.

religious, or other reasons, and some contract out for embalming services. TFSC must penalize funeral homes for failure to adhere to the preparation room requirements unless the agency has granted the funeral home an exemption. In fiscal year 2017, the agency cited 22 funeral homes for preparation room violations, including four that used their preparation room for other purposes, like storing files. However statute limits the allowable exemptions, as shown in the textbox, *Preparation Room Exemption Requirements*.<sup>2</sup> The agency does not track the number of exemptions requested or denied, but reports that as of fiscal year 2017, it had approved 71 exemptions. Authorizing the agency to establish the criteria for preparation room exemptions in rule, instead of adhering to prescriptive statutory requirements, would recognize the changing business practices in the death care industry and could alleviate unnecessary and costly requirements for businesses that do not provide embalming services.

Unnecessary notarization requirements. Application forms should be simple and straightforward, and only require information necessary to determine an applicant's eligibility for licensure. The agency requires individuals to submit notarized applications for licensure and renewals, and other forms, such as changes of employment, preparation room exemptions, and franchise tax affidavits. Requiring notarization is an unnecessary requirement on the applicant that complicates processes without adding value. Notarization is meant to verify identify, not truthfulness, and state law already prohibits an individual from knowingly making a false entry in a government record.<sup>3</sup> Removing notarization requirements would eliminate unnecessary bureaucratic obstacles in the agency's processes.

- **Inefficient renewal process.** License renewal should be scheduled as efficiently as possible to minimize burdens but ensure adequate oversight of licensees. Statute requires crematory establishments to renew licenses on an annual basis, and agency rules require funeral homes and commercial embalming facilities to renew annually, which adds to the administrative workload of the agency's small, three-person licensing staff.<sup>4</sup> Statute also sets an annual term for the provisional license for prospective funeral directors and embalmers.<sup>5</sup> However, the agency has adopted a biennial renewal process for funeral directors and embalmers, which is less burdensome and more efficient for the agency and easier for licensees.<sup>6</sup> Allowing the agency to determine the license renewal process for all of its licenses could create efficiencies for the agency and be less burdensome for licensees.
- **Inadequate use of technology.** Where possible and appropriate, agencies should take advantage of technology to carry out regulatory duties in an efficient and effective manner.

Cumbersome application process. Licensing agencies should accept applications and fees online, which makes the process easier for both

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*Requiring annual license renewal is burdensome and inefficient for both consumers and the agency.*

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staff and applicants at minimal additional cost. Although TFSC accepts renewals online, applicants are still required to mail hard copies of initial applications and certified checks or money orders to the agency. The Health Professions Council has assisted several occupational licensing agencies in modernizing licensure processes and fee collections, such as the State Board of Dental Examiners and the Texas State Board of Pharmacy. Accepting applications and fees online would reduce hurdles for applicants without compromising the agency's ability to determine applicants' eligibility for licensure and, once implemented, would eventually be a simpler, more efficient process for agency staff.

Outdated agency operations. An agency's regulatory processes should adapt to deal with changing industry practices or technological advances. Statute requires the agency to develop a brochure with consumer information and make that brochure available to the public and licensees.<sup>7</sup> Although the brochure is accessible to the public through the agency's website, licensees must order and pay for printed, physical copies of the brochure from the agency, which they then must distribute to consumers seeking funeral services.<sup>8</sup> In fiscal year 2017, the agency spent over \$15,000 to print and mail brochures to licensees and collected approximately \$70,000 in associated fees. Businesses in the funeral and death care industry are increasingly reliant on electronic processes, and many consumers may prefer to receive copies of documents through electronic communications or conduct entire transactions wholly online. Allowing licensees to access a downloadable version of the brochure through the agency's website, rather than paying for the agency to print and mail copies, would remove the agency from micromanaging business affairs and reduce unnecessary costs to licensees. The licensees could provide a physical or electronic copy to consumers, depending on their preference.

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*Regulatory processes should adapt to deal with changing industry practices or technological advances.*

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### **Licensing provisions in the agency's statute, rules, and procedures do not follow model standards and could potentially affect the fair treatment and effective regulation of licensees.**

- **Unnecessary qualifications for licensure.** Qualifications for licensure should be related to and not unnecessarily restrict entry into the profession. When reviewing an applicant's criminal history and determining whether to deny a license, an agency's application of qualifications related to felony and misdemeanor convictions should generally be guided by the standards contained in Chapter 53, Texas Occupations Code. In practice, TFSC properly adheres to the standards set forth in Chapter 53, even though statute also allows the agency to consider crimes of moral turpitude, which may not relate to the profession.<sup>9</sup> Removing this unused and unnecessary reference to crimes of moral turpitude from statute would align with the agency's current practice of reviewing an applicant's criminal history and determining whether to deny a license on the basis of standards relevant to the license being sought. Additionally, directing the agency to thoroughly

document its decision-making process for reviews of applications with criminal history would further ensure the agency continues to fairly review criminal histories and does not create arbitrary barriers to licensure.

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*TFSC does not have policies to recognize specific military occupations relevant to funeral directing or embalming.*

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- **Informal procedures for crediting military experience.** An agency's application of qualifications related to military service members, veterans, and spouses should be guided by the standards contained in Chapter 55, Texas Occupations Code. In October 2015, TFSC adopted rules to allow a military service member, veteran, or spouse to demonstrate competency for a license through alternative means.<sup>10</sup> However, no formal standards or policies exist to guide the evaluation and crediting of applicants' competency through those alternative means. For example, the agency does not have policies recognizing specific military occupations that are relevant to funeral directing or embalming or acknowledging experiences that may fulfill certain requirements.<sup>11</sup> The agency reports receiving few applications from military service members, veterans, or spouses, but formally adopted policies would better ensure these individuals are evaluated and credited fairly and consistently for their service-related experience.
- **No content review for continuing education courses.** Continuing education requirements are designed to ensure licensees keep up with advances in their field. Agency rules outline the process for approving courses, and the agency requires continuing education providers to pay an annual provider fee of \$250 and an additional \$50 per course.<sup>12</sup> However, Sunset staff found the agency does not conduct a review of courses prior to approval or denial, nor does it audit courses after the fact. As a result, the agency does not have sufficient assurances of the quality of continuing education courses. Other occupational licensing agencies require continuing education providers to demonstrate their capability to meet agency requirements before approving courses.<sup>13</sup> Improved agency oversight would strengthen the integrity of courses that are intended to keep licensees competent.
- **Limited fee authority.** An agency's statute should be consistent with its actual operations and should authorize the agency to set appropriate fees to collect sufficient revenue to fund its operations. Statute authorizes TFSC to charge fees for licenses, renewals, and applications but does not clearly authorize fees for other functions, such as reviewing continuing education courses.<sup>14</sup> Rather than specifying the individual fee types an agency can charge to recover its costs, other regulatory agencies' statutes, like those for the Texas Board of Nursing and Texas Board of Chiropractic Examiners, provide broad, general fee-setting authority to allow the agency to fully recover its costs.<sup>15</sup> Providing TFSC this broader statutory authority would give the agency the flexibility needed to fully recover the costs of its operations. The Legislature would continue to exercise control and oversight of the agency's fees and revenue generation through the appropriations process.

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*The agency does not review continuing education courses.*

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## Recommendations

### *Change in Statute*

#### **2.1 Authorize TFSC to determine the criteria for preparation room exemptions.**

This recommendation would remove the preparation room exemption requirements from statute and instead authorize TFSC to determine, by rule, the circumstances in which a business could seek an exemption from the requirement. Given the variety of business structures and practices of funeral homes, providing more flexibility for TFSC to determine when a preparation room is necessary would allow the agency to adapt its regulation to the changing needs of the industry without sacrificing the safe and respectful practices required of funeral and death care services providers.

#### **2.2 Authorize TFSC to set license terms in rule.**

This recommendation would authorize TFSC to set the terms for licenses in rule. Under this recommendation, the agency could establish a biennial renewal process for death care business licensees, reducing staff time and resources spent processing these renewals without compromising oversight of licensees. Further, if Recommendation 1.4 in Issue 1 to establish a biennial inspection process is adopted, this recommendation would better align the inspection and renewal functions for business licensees.

#### **2.3 Remove outdated and unused licensure qualifications.**

This recommendation would align statute with the agency's practice of only considering misdemeanors and felonies related to funeral directing or embalming when considering applicants' criminal histories, according to Chapter 53, Texas Occupations Code. This recommendation would also remove the unused reference to "crimes of moral turpitude," which the agency does not consider separately from crimes related to the profession. Finally, in implementing this recommendation, the agency should thoroughly document all decisions regarding criminal history evaluations, including the specific reasons for approving or denying a license, to ensure consistent and fair evaluations of applicants.

#### **2.4 Provide TFSC general fee-setting authority to fully recover its costs.**

This recommendation would provide the agency with typical fee-setting authority rather than the statute's limited fee authority for specific license types and functions. Providing broader statutory fee authority will give the agency flexibility to charge fees as necessary to recover the costs of all of its operations. The Legislature would continue to monitor all aspects of the agency's fiscal management, including its fees, through the appropriations process.

### *Management Action*

#### **2.5 Direct TFSC to eliminate unnecessary notarization requirements.**

This recommendation would direct TFSC to remove unneeded notarization requirements in its licensure and other processes to make these processes less burdensome for licensees and more efficient for agency staff. Current provisions of the Texas Penal Code that make falsifying a government record a crime would continue to apply. This recommendation would also remove an obstacle to putting license applications online.

## **2.6 Direct the agency to accept all license applications and fee payments online.**

The agency should work with the Health Professions Council and Texas.gov to enable receipt of all license applications online, as well as associated fee payments. This recommendation would reduce the burden on applicants to submit hard copy application forms and mail in checks and money orders. Although implementation will require modifications to information technology resources, these changes will eventually reduce the administrative burden on agency staff in processing applications and payments.

## **2.7 Direct the agency to make the consumer brochure freely available to licensees online.**

Rather than printing and mailing physical copies of the consumer brochure to licensees for a fee, this recommendation would direct the agency to make the consumer brochure available to licensees on the its website at no cost. Licensees would still be required to provide a copy of the brochure to consumers, either electronically or in hard copy, based on their preference.

## **2.8 Direct TFSC to develop standard procedures for evaluating experience for military service members, military veterans, and military spouses.**

Although TFSC has adopted rules in line with Chapter 55, Texas Occupations Code, this recommendation would direct TFSC to adopt rules or policies specifying how military service members, veterans, and spouses can demonstrate qualifications for licensure through alternative means. The agency should ensure all licensure qualification decisions are thoroughly documented to ensure consistent analysis between applicants. This recommendation would ensure decisions affecting licensure fairly and appropriately consider the unique experiences and qualifications of military service members, veterans, and spouses.

## **2.9 Direct TFSC to review and evaluate continuing education courses.**

This recommendation would direct the agency to comply with its current rules to conduct an evaluation of continuing education courses submitted prior to their approval or denial. This evaluation should ensure the courses provide licensees with relevant and useful continuing education.

## **Fiscal Implication**

Overall, these recommendations would have a negative impact of about \$55,000 in appropriated receipts. Making the consumer brochure available online would alleviate the administrative and financial burden on staff to process requests and mail hard copies to licensees, which costs about \$15,000 annually. However, TFSC would no longer collect fees for providing brochures, which generates about \$70,000 annually. The agency could adjust its fees proportionally to cover costs. The remaining recommendations would not have a significant fiscal impact to the state.

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<sup>1</sup> All citations to Texas statutes are as they appear on <http://www.statutes.legis.texas.gov/>. Section 651.351(d)(5), Texas Occupations Code.

<sup>2</sup> Section 651.351(g), Texas Occupations Code.

<sup>3</sup> Section 37.10, Texas Penal Code.

<sup>4</sup> Section 651.658, Texas Occupations Code; 22 T.A.C. Section 203.9(b).

<sup>5</sup> Section 651.3045(a), Texas Occupations Code.

<sup>6</sup> 22 T.A.C. Section 203.1(c).

<sup>7</sup> Section 651.201, Texas Occupations Code.

<sup>8</sup> 22 T.A.C. Section 203.26.

<sup>9</sup> Section 651.259, Texas Occupations Code; 22 T.A.C. Section 203.16. Statute only allows the agency to consider crimes of moral turpitude when reviewing an application by an out-of-state licensee seeking applying for a license in Texas.

<sup>10</sup> 22 T.A.C. Section 203.2.

<sup>11</sup> For example, no agency policy guides how military members assigned relevant occupations or specializations during their service can submit evidence of their training or education, or what evidence is relevant to demonstrating specific competencies.

<sup>12</sup> 22 T.A.C. Sections 203.8(c) and 204.9(d).

<sup>13</sup> See 16 T.A.C. Section 59.30 (Texas Department of Licensing and Regulation); and 22 T.A.C. Sections 275.1 and 275.2 (Texas Optometry Board).

<sup>14</sup> Sections 651.154, 651.164, 651.165, 651.1655, 651.252, 651.257, 651.259, 651.2595, 651.260, 651.264, 651.265, 651.267, 651.302, 651.305, 651.351, 651.353, 651.354, 651.657, and 651.658, Texas Occupations Code.

<sup>15</sup> Sections 301.155 (Texas Board of Nursing) and 201.153 (Texas Board of Chiropractic Examiners), Texas Occupations Code.



# ISSUE 3

## *The Agency's Regulation of Cemeteries Is Not Necessary to Protect the Public.*

### Background

Texas is estimated to have approximately 50,000 cemeteries, ranging from single gravesites in backyards to formally organized and maintained cemeteries. The Texas Department of Banking (DOB) regulates perpetual care cemeteries, which have associated trust funds that provide for ongoing maintenance of the cemetery grounds. All cemeteries established after September 1, 1993, must be licensed as a perpetual care cemetery.<sup>1</sup> Statute exempts most other cemeteries from state regulation, as shown in the textbox, *Cemetery Exemptions*.<sup>2</sup> In 2001, the Texas Funeral Service Commission (TFSC) received authority to regulate the remaining non-exempt, non-perpetual care cemeteries, which totaled five cemeteries in fiscal year 2017. The addition of these cemeteries to the agency's regulatory duties also expanded membership of the agency's commission to include a cemetery owner.<sup>3</sup> TFSC has also chosen to take on a limited role in mediating access to publicly inaccessible cemeteries on private land, since statute creates a special right of ingress and egress that allows private land owners and interested persons to work out an agreeable time and route to and from these cemeteries.<sup>4</sup>

#### **Cemetery Exemptions**

Regulation by the Texas Funeral Service Commission does not apply to

- a family, fraternal, or community cemetery no larger than 10 acres;
- an unincorporated association of plot owners not operated for profit;
- a church, a religious society or denomination, or an entity solely administering the temporalities of a church or religious society or denomination;
- a public cemetery owned by this state, a county, or a municipality; or
- a perpetual care cemetery.

The Sunset Advisory Commission has a long history of evaluating regulatory programs, guided by standards set in the Sunset Act.<sup>5</sup> In 2013, the Legislature re-emphasized the need for a rigorous assessment of state regulation by adding criteria for Sunset reviews of licensing and regulatory programs.<sup>6</sup> Sunset reviews evaluate the need for agencies and programs; when evaluating licensing and regulatory programs, the burden is on proving the need for the regulation. The assessment of need occurs through a detailed analysis of the potential harm, whether in terms of physical harm or in more subjective terms, such as financial or economic loss. With these criteria in mind, Sunset staff reviewed different license types and regulatory functions administered by TFSC and found no need for continued regulation of non-perpetual care cemeteries or involvement in cemetery access mediations.

### Findings

#### **Regulation of non-perpetual care cemeteries is unnecessary to protect the public.**

- **Regulation adds little value.** Regulating five non-perpetual care cemeteries does not protect a meaningful, defined public interest. Since receiving authority to regulate these cemeteries, TFSC has licensed between three and five cemeteries each year. The agency's inspections and a lack of

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*Removing five cemeteries from TFSC oversight would not lessen protections in law.*

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substantive complaints have not shown a need for continued regulation of these few cemeteries to protect the public. In fiscal years 2015–2017, the agency received only 35 complaints relating to cemeteries, all of which were nonjurisdictional and referred to other agencies or dismissed. Complaints referred to other agencies generally involve perpetual care cemeteries or prepaid funeral contracts issued under the jurisdiction of DOB and the Texas Department of Insurance, not TFSC.

- **Separate laws better protect consumers.** Statute requires cemeteries to maintain specific records of the location of remains and adhere to laws governing the removal of remains, maintaining the condition of cemeteries, and other requirements.<sup>7</sup> Statute also creates criminal penalties for certain violations of cemetery laws, such as fraudulent plot sales.<sup>8</sup> Other agencies, like DOB and the Texas Historical Commission have a role in enforcing cemetery laws, and citizens can pursue private action in certain cases.<sup>9</sup> Removing the few non-perpetual care cemeteries from state regulation would not affect cemeteries' duties or lessen the protections provided by law.
- **No meaningful enforcement activity.** As shown in the table, *Regulation of Cemeteries*, TFSC has not taken any meaningful enforcement action against a cemetery within its jurisdiction in the last three years. Comparatively, in fiscal year 2017, TFSC received 150 complaints against funeral homes, and took enforcement action against 29. Further, in the past three years, TFSC conducted only 12 cemetery inspections, none of which resulted in any enforcement action. Finally, TFSC can request that the office of the attorney general bring an injunction against cemeteries for violations of laws outside of the agency's regulatory jurisdiction, but to date, the agency has only done so once in 2016.

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*TFSC has not taken meaningful enforcement action against a cemetery in the last three years.*

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#### **Regulation of Cemeteries**

	<b>FY 2015</b>	<b>FY 2016</b>	<b>FY 2017</b>
Licensed Cemeteries	5	3	5
Inspections	5	5	2
Inspection Violations	0	0	2
Complaints Received	9	7	19
Referred to Other Agency	9	6	14
Complaint Dismissed	0	1	5

#### **Cemetery access mediations unnecessarily expend agency resources for wholly private disputes.**

Statute grants citizens the right to access a cemetery or private burial ground that is not generally open to the public, such as family cemeteries on private land.<sup>10</sup> The agency has implemented a process that allows private landowners or interested citizens to petition TFSC to help resolve issues of access or establish visitation schedules.<sup>11</sup> Usually, the agency conducts these mediations informally

through phone conversations, but it has also facilitated one mediation through the State Office of Administrative Hearings.<sup>12</sup> As an occupational licensing agency, TFSC has no stake in the outcome of these cases, which typically involve unregulated cemeteries. Although the agency reports having few requests for mediation, when these requests occur, the agency's lone staff attorney must spend time drafting letters to private landowners, communicating with involved individuals, and traveling to and from cemetery properties.

Further, statute creates a private right of access to cemeteries that can currently be enforced through civil litigation or private mediations, and criminal laws exist to address interference with that right.<sup>13</sup> However, Texas courts vary as to the scope of citizens' rights to access cemeteries on private lands, and the analysis is fact-specific to the circumstances surrounding each cemetery.<sup>14</sup> The agency's involvement in these wholly private disputes potentially puts TFSC at risk of being unnecessarily entangled in litigation and overextends the agency's limited resources that are primarily designated to regulating funeral and death care service providers and businesses.

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*TFSC's  
involvement  
in private  
cemetery access  
disputes puts the  
agency at risk  
of litigation.*

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## Recommendations

### ***Change in Statute***

#### **3.1 Discontinue TFSC's regulation of non-perpetual care cemeteries.**

Under this recommendation, TFSC would no longer regulate non-perpetual care cemeteries. This recommendation would not impact current regulation of perpetual care cemeteries by DOB and all cemeteries would still be required to follow state laws. Also, TFSC should continue to coordinate with other state agencies that regulate or monitor cemeteries, such as DOB and the Texas Historical Commission, to ensure the state maintains relevant information on the location and contact information for cemeteries.

As part of this recommendation, TFSC would no longer have authority to establish rules related to cemeteries or seek legal remedies for violations of cemetery laws or nuisance, but would retain authority to adopt rules regarding removal of remains.<sup>15</sup> As a result, this recommendation would also authorize the attorney general's office to seek injunctive relief without a request from TFSC, to ensure cemetery laws under Chapter 711, Texas Health and Safety Code, can be enforced.<sup>16</sup>

#### **3.2 Replace the member of the TFSC commission who must be a cemetery owner or operator with a public member.**

If Recommendation 3.1 is adopted, this recommendation would modify statute to replace the cemetery owner or operator member of the commission with a public member. As a result, the seven-member commission would consist of five public members and two members dual-licensed as an embalmer and funeral director. Changing the composition of the commission would ensure it properly reflects the agency's reduced regulatory jurisdiction.

## Management Action

### 3.3 Direct the agency to discontinue its involvement in mediating private cemetery access disputes.

This recommendation would direct TFSC to discontinue its cemetery access mediation process. Statute adequately provides a means for protecting citizens’ rights of access to cemeteries and does not require, direct, or necessitate the agency’s involvement in private affairs.

## Fiscal Implication

Overall, these recommendations would not have a significant fiscal impact. The recommendation to discontinue state regulation of non-perpetual care cemeteries would result in an annual loss of about \$500 in revenue currently collected from licensure fees. However, discontinuing regulation of non-perpetual care cemeteries and involvement in cemetery access mediations would eliminate agency costs associated with those functions.

### Texas Funeral Service Commission

Fiscal Year	Loss to the General Revenue Fund
2020	\$500
2021	\$500
2022	\$500
2023	\$500
2024	\$500

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<sup>1</sup> All citations to Texas statutes are as they appear on <http://www.statutes.legis.texas.gov/>. Section 711.021(f), Texas Health and Safety Code.

<sup>2</sup> Sections 711.021(g) and 712.002, Texas Health and Safety Code.

<sup>3</sup> Section 651.051, Texas Occupations Code; Chapter 651 (H.B. 3067), Acts of the 77th Texas Legislature, Regular Session, 2001.

<sup>4</sup> Section 711.041, Texas Health and Safety Code; 22 T.A.C. Section 205.2.

<sup>5</sup> Section 325.011, Texas Government Code; Chapter 222 (H.B. 86), Acts of the 83rd Texas Legislature, Regular Session, 2013.

<sup>6</sup> Section 325.0115, Texas Government Code.

<sup>7</sup> Sections 711.003, 711.004, 711.0105, 711.061, and Chapter 711, Subchapter E, Texas Health and Safety Code.

<sup>8</sup> Section 711.052, Texas Health and Safety Code.

<sup>9</sup> Section 711.012, Texas Health and Safety Code; Chapter 711, Subchapter D, Texas Health and Safety Code.

<sup>10</sup> Section 711.041, Texas Health and Safety Code.

<sup>11</sup> 22 T.A.C. Section 205.2; Section 711.012(b), Texas Health and Safety Code, which authorizes the agency to establish procedures to enforce and administer Section 711.041, Texas Health and Safety Code.

<sup>12</sup> State Office of Administrative Hearings, *Re: Access to the Ranzau Family Cemetery*, Docket No. 513–17–0515 (2017).

<sup>13</sup> Sections 711.041 and 711.0521, Texas Health and Safety Code.

<sup>14</sup> *MEEK v. Smith*, 7 S.W.3d 297 (Tex. App.—Beaumont [9th Dist.] 1999) (finding a taking occurred in violation of Section 17, Article I, Texas Constitution, and finding Section 711.041, Texas Health and Safety Code, unconstitutional as applied to the specific case); *Davis v. May*, 135 S.W.3d 747 (Tex. App.—San Antonio [4th Dist.] 2003) (distinguishing *MEEK*) (finding no taking and finding Section 711.041, Texas Health and Safety Code, constitutional as applied to the specific case).

<sup>15</sup> Sections 711.004(f), 711.0105, and 711.012(b), Texas Health and Safety Code.

<sup>16</sup> Section 711.0515, Texas Health and Safety Code.

# ISSUE 4

## *Texas Has a Continuing Need for the Texas Funeral Service Commission, but Opportunities Exist to Improve Public Participation.*

### Background

The Legislature established the State Board of Embalming in 1903 to help prevent the spread of diseases associated with embalming and otherwise caring for and disposing of the dead. Over the next century, funeral directors and funeral homes, commercial embalming facilities, crematories, and a few cemeteries became regulated by the renamed Texas Funeral Service Commission (TFSC). During this time, the regulatory framework of the funeral and death care industry shifted from addressing public health concerns to protecting consumers from unethical and deceptive practices during one of the most emotionally and financially challenging situations in life. Today, TFSC's mission is to protect the public from deceptive practices in the funeral and death care industry through a process of impartial enforcement, inspection, licensing, and education to guarantee every person's final disposition is conducted professionally and ethically.

Previous Sunset reviews have identified significant management and operational problems at TFSC. In 2001, following attempts to correct the agency's poor trajectory, the Sunset Commission and Legislature found the agency's management problems were seriously affecting its ability to enforce statutory requirements, perform basic licensing duties, and address consumer concerns. After a two-year probationary period, in 2003, TFSC was continued for 12 years with the expectation that operations would improve.<sup>1</sup> During this current review, Sunset staff found the agency has addressed past concerns and, now stabilized under consistent leadership, has been able to focus on important regulatory duties. In fiscal year 2017, TFSC conducted licensing, inspection, and enforcement functions to oversee more than 6,000 funeral directors, embalmers, death care service businesses, and cemeteries, and resolved 182 complaints related to this industry, 75 percent of which were consumer complaints.

### Findings

#### **Texas has a continuing need to regulate the funeral and death care industry.**

The primary role of state regulation of occupations is to protect public health, safety, or welfare, including the financial health of consumers.<sup>2</sup> Funerals can be one of the largest lifetime expenditures for families. Typical funeral costs average more than \$7,000 according to the National Funeral Directors Association, and the funeral and death care industry generates billions of dollars in revenue each year from the sales of funeral merchandise and arrangements, cremations, burials, embalming, and other death care goods and services.<sup>3</sup> In Texas, even basic funeral services can cost between \$3,000 to \$9,000, according to some estimates, as well as the costs of a casket and cemetery plot, and simple cremations can cost more than \$3,000.<sup>4</sup> Recognizing individuals are perhaps at their most vulnerable when a family member or loved one passes away,

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*Basic funeral services can cost between \$3,000 to \$9,000.*

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federal and state governments have instituted protections against deceptive or misleading practices historically associated with the financial investment of a person’s final disposition.

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*The Funeral Rule protects against false or misleading practices in the death care industry.*

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- **Federal regulation.** The Federal Trade Commission (FTC) plays a significant role in regulating the funeral and death care industry through enforcement of the “Funeral Rule.” The Funeral Rule is a set of federal prohibitions against false or misleading business practices that providers of funeral goods and services must follow.<sup>5</sup> The textbox, *FTC Funeral Rule*, highlights major components of the Funeral Rule. Enforcement of the Funeral Rule occurs separately from state oversight but often overlaps with the regulation of funeral directors, embalmers, and individuals who sell prepaid funeral contracts.

<p><b><i>FTC Funeral Rule</i></b></p> <p>In addition to other requirements, the Funeral Rule requires funeral providers to</p> <ul style="list-style-type: none"> <li>● provide consumers itemized prices for goods and services offered for sale;</li> <li>● make specific pricing disclosures;</li> <li>● explain that embalming is not required by law, except in certain special cases; and</li> <li>● not require the purchase of a casket for a direct cremation.</li> </ul>
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- **State regulation.** Texas, like most states, has adopted significant protections for consumers against fraudulent or misleading funeral business practices, similar to the Funeral Rule, and has set additional standards of conduct for funeral and death care service providers. These regulations ensure individuals and businesses providing funeral and death care services are competent, practice professionally and honestly, and are held accountable for their actions. Without regulation, Texans would be open to potentially deceptive, unethical, or unscrupulous funeral and death care practices, and would have no means for rectifying these problems other than through the courts.

**No substantial benefit would result from changing TFSC’s organizational structure.**

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*The agency’s functionality supports continuing its structure.*

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Sunset staff considered organizational alternatives for administering TFSC’s various functions but determined no substantial benefits would result from transferring or merging the agency’s functions. The Legislature has repeatedly supported an independent agency structure to regulate funeral and death care providers and businesses in Texas, despite more tumultuous moments in the agency’s past.<sup>6</sup> Sunset staff found the agency’s current functionality supported continuing its existing structure. However, Sunset staff did consider whether efficiencies would be achieved by consolidating agency functions with another agency.<sup>7</sup> Several other agencies have a role in the regulation of the funeral and death care industry, but these roles are limited and did not justify any recommendation for consolidation.

- **Funeral and death care service providers.** No other agency in Texas regulates individuals that provide direct funeral and embalming services.

The Texas Department of Banking (DOB) and Texas Department of Insurance (TDI) issue permits for funeral homes and cemeteries that sell prepaid funeral merchandise or services in Texas, commonly called prepaid funeral contracts. Funeral directors often sell prepaid funeral contracts, but neither DOB nor TDI regulate the underlying goods or services in those contracts or the professional aspects of permittees' conduct. In 2009, the Legislature made significant changes to the regulation of prepaid funeral contract permittees but chose to not consolidate oversight of prepaid funeral contracts into TFSC or transfer regulation of funeral service providers into DOB or TDI.<sup>8</sup> Further, to avoid duplication of regulatory activities, these agencies collaborate through memoranda of understanding to share licensing and disciplinary information as necessary.<sup>9</sup>

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*Neither DOB nor TDI regulate the underlying goods or services in prepaid funeral contracts.*

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- **Funeral and death care service businesses.** Both the Department of State Health Services (DSHS) and Texas Commission on Environmental Quality (TCEQ) have a limited role in establishing certain regulations for funeral and death care service businesses — funeral homes, commercial embalming facilities, and crematories — but primary oversight and enforcement of these businesses rests with TFSC. For example, TCEQ sets emissions standards for crematories and issues air quality control permits, but does not inspect crematories. Similarly, DSHS sets minimum standards for disposing of human blood but does not inspect funeral homes or commercial embalming facilities for compliance. Rather, TFSC inspects these businesses for proper licensure, health and safety standards, and regulatory compliance. As discussed in Issue 1, TFSC and DSHS should improve coordination of enforcement of funeral home regulations, but TFSC's regulatory duties go far beyond the involvement by either DSHS or TCEQ and do not directly relate to either agency's primary mission. Transferring regulation of funeral and death care service businesses would likely reduce the effectiveness of state regulation.
- **Cemeteries.** Several private, local, state, and federal agencies and organizations regulate Texas cemeteries. Of the estimated 50,000 cemeteries in Texas, state agencies only regulated about 250 in fiscal year 2017, and of these, only five were regulated by TFSC. As discussed in Issue 3, Sunset staff determined TFSC's limited cemetery regulation is unnecessary and meaningless, and recommends eliminating it. However, DOB would retain regulatory authority over perpetual care cemeteries.
- **Umbrella agency structure.** An alternative approach to having an independent agency is the consolidation of needed regulatory programs under an umbrella structure. The state has long regulated various trades and professions under the Texas Department of Licensing and Regulation (TDLR). By specializing staff along functional lines, umbrella agencies like TDLR can provide improved long-term efficiency over smaller agencies with a singular regulatory focus. In addition, larger umbrella agencies can provide more avenues for developing and retaining staff, helping to insulate them against the institutional loss and disruption that can result from the departure of just a few key personnel in smaller agencies.

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*TFSC only regulates five cemeteries.*

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*Changing TFSC's organizational structure is not justified.*

Sunset staff found no significant problems with TFSC's independent structure or functions that would justify transferring regulation of the funeral and death care industry to TDLR. Transferring an agency entails significant costs for moving staff, resources, and data and providing information technology and infrastructure. TDLR recently completed the transfer of 13 licensing programs from DSHS, the driver training program and parent-taught driver education programs from the Texas Education Agency, and the regulation of podiatrists, in addition to establishing two new licensing programs created during the 85th Legislative Session for behavior analysts and transportation network companies.<sup>10</sup> Sunset staff considered the possible disruption transferring the functions of TFSC might have and ultimately concluded the potential benefits of organizational change for change's sake were not justified at this time.

**Although organizational structures vary, about one-third of states rely on an independent licensing agency to regulate the funeral and death care industry.**

All states regulate some aspect of the funeral and death care industry, as shown in the graph, *Regulation of Funeral Service Providers in the United States*.<sup>11</sup> Colorado is the only state that does not license individuals, but it does regulate funeral homes and crematories. Most states rely on an umbrella licensing agency or health department to regulate funeral and death care service providers, although several of these states have associated professional boards. However, 18 states, including Texas, use independent agencies to oversee licensing and enforcement of the industry. Like most states, Texas regulates funeral directors and embalmers, as well as funeral homes and crematories. Texas is one of 12 states that regulates cemeteries through the same agency as other funeral and death care service providers.

*Like Texas, 17 other states use an independent agency to regulate the death care industry.*

**Regulation of Funeral Service Providers in the United States**

Independent Agency	AL, AZ, AR, FL, GA, ID, KS, KY, LA, MS, NV, NC, ND, OH, OK, OR, TX, WV	18
Umbrella Licensing Agency	AK, CA, CO, DE, IL, IN, ME, MA, MI, MO, MT, NH, NJ, NM, PA, SC, TN, UT, VT, VA, WA, WI, WY	23
Health Department	CT, HA, IA, MD, MN, NE, NY, RI, SD	9

**The agency has made positive changes but further opportunities exist to better engage stakeholders and improve transparency.**

Since its last Sunset review, TFSC has made numerous changes to address internal weaknesses and meet expectations for licensing and enforcement functions, including creating clear penalty guidelines, eliminating a backlog

of complaints, and improving relations with licensees and consumers. For example, the agency posts a quarterly newsletter on its website and recently established an email notification system. While the agency's efforts are pointed in the right direction, stakeholder feedback obtained throughout the review indicates a desire for more engagement and information. The following material highlights opportunities to build on the agency's progress.

- **Stakeholder advisory committees.** Advisory committees are one means of obtaining additional input for the agency, broadening the perspectives and enabling greater representation in the agency's policymaking activities. Currently, statute authorizes TFSC to appoint committees from among its commission members, but does not authorize TFSC to establish advisory committees using licensees, industry members, or the public.<sup>12</sup> Licensees and members of the public often contact agency staff to discuss concerns or ideas for changes to TFSC policies or rules, and the agency follows notice and comment procedures for rulemaking. However, no formal means of directly engaging stakeholders in policymaking exists. Authorizing TFSC to establish advisory committees using licensees, consumers, and other stakeholders would provide an opportunity to better respond to the ideas and concerns of Texans and the industry.
- **Reporting agency performance information.** The Sunset Act establishes a process for the Sunset Commission to consider if reporting requirements of agencies under review need to be continued or abolished.<sup>13</sup> Statute requires TFSC to submit a biennial report to the governor describing the agency's activities during the preceding two years.<sup>14</sup> However, in at least the past four fiscal years, the agency has not submitted a biennial report. The agency does post information on its website regarding new policies and generally required reports, like legislative appropriations requests and strategic plans, but these reports do not contain detailed information regarding the agency's licensing, inspection, and enforcement activities. During the review, stakeholders expressed a desire for more outreach and transparency by the agency. Publishing more detailed information about the agency's activities would promote transparency and create a means of identifying regulatory problem areas. Further, public reporting creates accountability for the agency to the Legislature, licensees, and members of the public.

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*No formal means of directly engaging stakeholders in policymaking exists.*

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*Publicly reporting performance information creates accountability to the Legislature, licensees, and the public.*

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### **TFSC's statute does not reflect updated requirements for commission member training.**

The Sunset Commission has developed a set of standard recommendations that it applies to all state agencies reviewed unless an overwhelming reason exists not to do so. These across-the-board recommendations (ATBs) reflect an effort by the Legislature to place policy directives on agencies to prevent problems from occurring, instead of reacting to problems after the fact. ATBs are statutory administrative policies adopted by the Sunset Commission that

contain “good government” standards for state agencies. The ATBs reflect review criteria contained in the Sunset Act designed to ensure open, responsive, and effective government.

TFSC’s statute does not reflect updated requirements for commission member training. The statute contains standard language requiring members to receive training and information necessary for them to properly discharge their duties.<sup>15</sup> However, statute does not contain a newer requirement that the agency create a training manual for all members or specify that the training must include a discussion of the scope of and limitations on TFSC’s rulemaking authority.

### **The agency should continue to implement state cybersecurity requirements and industry best practices.**

The 85th Legislature tasked the Sunset Commission with assessing cybersecurity practices for agencies under review.<sup>16</sup> The assessment of TFSC’s cybersecurity practices focused on identifying whether the agency complied with state requirements and industry cybersecurity best practices. Sunset staff did not perform technical assessments or testing due to lack of technical expertise, but worked closely with the Department of Information Resources to gather a thorough understanding of TFSC’s technical infrastructure. Sunset staff found no issues relating to TFSC’s cybersecurity practices that require action by the Sunset Commission or the Legislature, and communicated the results of this assessment directly to TFSC.

## **Recommendations**

### ***Change in Statute***

#### **4.1 Continue the Texas Funeral Service Commission for 12 years.**

This recommendation would continue the Texas Funeral Service Commission until September 1, 2031, ensuring funeral and death care service providers are competent to practice and taking appropriate regulatory action to protect consumers.

#### **4.2 Authorize TFSC to create advisory committees.**

Under this recommendation, TFSC would be authorized to establish advisory committees subject to the requirements of Chapter 2110, Texas Government Code. This recommendation would not require the creation of a specific advisory committee but would authorize TFSC to establish committees by rule to meet the changing needs of the agency.

#### **4.3 Modify the agency’s biennial reporting requirement to increase transparency.**

This recommendation would replace the agency’s biennial report on agency activities with an annual report on the agency’s licensing, inspection, and enforcement activities; changes to the agency’s policies; and complaint information. This recommendation would also statutorily require the report be approved by the commission and posted on the agency’s website, providing policymakers, stakeholders, and the public a complete picture of TFSC’s regulatory and operational activities. This recommendation would

not require physical copies of the report be made available, but the agency should post the report on its website and could make the report available to stakeholders and interested persons through social media or its email notification system.

In implementing this recommendation, TFSC should consider including the following types of information and measurements for each license type, based on technological reasonability and stakeholder interest:

- Number of applications received
- Number of licensees
- Average number of days to issue a license
- Number of inspections conducted and types of violations found
- Number of complaints received, sources of complaints, and allegations
- Number of complaints resolved, violations found, actions taken, and average time to resolve
- Number of cases referred to the State Office of Administrative Hearings (default and non-default)
- Number of cases appealed to district court

Under this recommendation, the agency would fully implement this recommendation no later than September 1, 2020, for fiscal year 2019 information.

#### **4.4 Update the standard across-the-board requirement related to commission member training.**

This recommendation would update existing statutory requirements for TFSC to provide commission member training by requiring TFSC to develop a training manual that each member attests to receiving annually, and require existing member training to include information and guidance about the scope of, and limitations on, TFSC's rulemaking authority. The training should provide clarity that the Legislature sets policy, and agency boards and commissions have rulemaking authority necessary to implement legislative policy.

## **Fiscal Implication**

Based on fiscal year 2018 appropriations, continuing TFSC for 12 years would require about \$821,000 annually. These costs are entirely paid for by the licensing and registration fees the agency collects. The state would also continue to receive approximately \$948,000 collected annually by the agency in excess of its costs.

- .....
- 1 Chapter 562 (H.B. 1538), Acts of the 78th Texas Legislature, Regular Session, 2003.
  - 2 All citations to Texas statutes are as they appear on <http://www.statutes.legis.texas.gov/>. Section 325.0115, Texas Government Code.
  - 3 “Statistics,” National Funeral Directors Association, last updated January 4, 2018, <http://www.nfda.org/news/statistics>; “Industry Snapshot: Funeral Homes and Funeral Services,” U.S. Census Bureau, last accessed June 17, 2018, [https://thedataweb.rm.census.gov/TheDataWeb\\_HotReport2/econsnapshot/2012/snapshot.html?NAICS=812210](https://thedataweb.rm.census.gov/TheDataWeb_HotReport2/econsnapshot/2012/snapshot.html?NAICS=812210).
  - 4 “2018 Survey of Austin Area Prices of Selected Funeral Goods and Services,” Funeral Consumers Alliance of Central Texas, last accessed June 28, 2018, [http://www.fcactx.org/uploads/8/1/6/9/81698996/2018\\_fcactx\\_fh\\_price\\_survey.pdf](http://www.fcactx.org/uploads/8/1/6/9/81698996/2018_fcactx_fh_price_survey.pdf).
  - 5 15 U.S.C. Chapter 57a(a); 15 U.S.C. Chapter 46(g); 16 C.F.R. Part 453; and “Complying with the Funeral Rule,” Federal Trade Commission, last updated April 2015, [https://www.ftc.gov/system/files/documents/plain-language/565a-complying-with-funeral-rule\\_2018.pdf](https://www.ftc.gov/system/files/documents/plain-language/565a-complying-with-funeral-rule_2018.pdf).
  - 6 Most recently, the Legislature rejected a transfer of the agency’s functions to the Texas Department of Licensing and Regulation. H.B. 2665, 82nd Texas Legislature, Regular Session, 2011 (referred to committee).
  - 7 Section 325.011(6), Texas Government Code.
  - 8 Chapter 1190 (H.B. 3762), Acts of the 81st Texas Legislature, Regular Session, 2009.
  - 9 Section 651.159, Texas Occupations Code.
  - 10 Chapter 838 (S.B. 202), Acts of the 84th Texas Legislature, 2015; Chapter 1044 (H.B. 1786), Acts of the 84th Texas Legislature, 2015; Chapter 282 (H.B. 3078), Acts of the 85th Texas Legislature, 2017; Chapter 1156 (S.B. 589), Acts of the 85th Texas Legislature, 2017; and Chapter 231 (H.B. 100), Acts of the 85th Texas Legislature, 2017.
  - 11 “Regulations in Funeral Service Licensing, Continuing Education and Pre-need,” The International Conference of Funeral Service Examining Boards, printed June 2017, available at <https://theconferenceonline.org/resources/state-licensing-requirements/>.
  - 12 Section 651.151(c), Texas Occupations Code.
  - 13 Section 325.012(a)(4), Texas Government Code.
  - 14 Section 651.162, Texas Occupations Code.
  - 15 Section 651.0511, Texas Occupations Code.
  - 16 Section 325.011(14), Texas Government Code.

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# APPENDICES



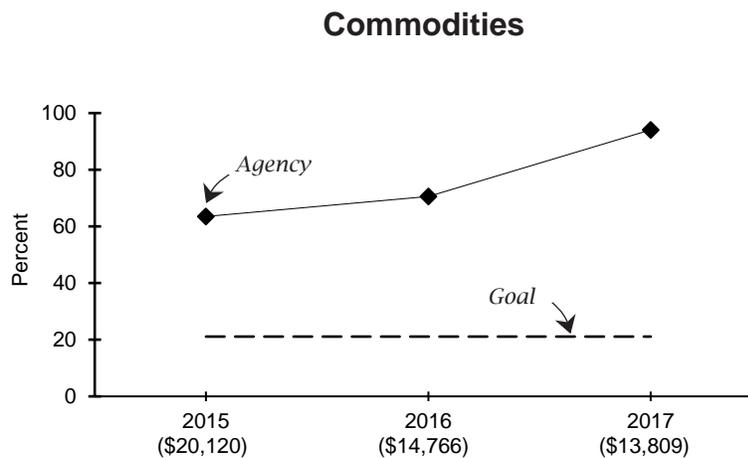
# APPENDIX A

## *Historically Underutilized Businesses Statistics 2015 to 2017*

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 Texas Funeral Service Commission's use of HUBs in purchasing goods and services. The agency maintains and reports this information under guidelines in statute.<sup>2</sup> In the charts, the dashed lines represent the goal for HUB purchasing in each category, as established by the comptroller's office. The diamond lines represent the percentage of agency spending with HUBs in each purchasing category from 2015 to 2017. Finally, the number in parentheses under each year shows the total amount the agency spent in each purchasing category.

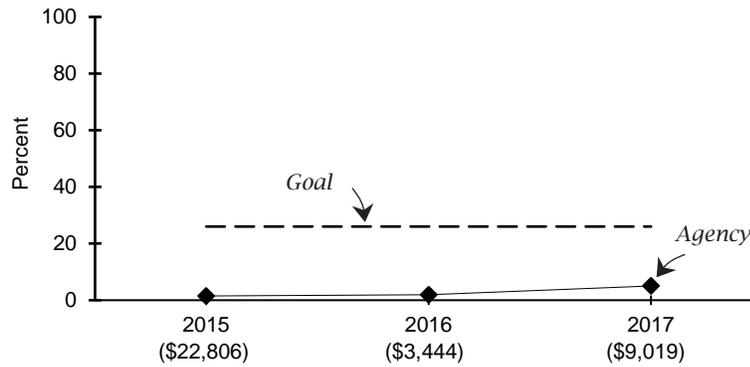
The Texas Funeral Service Commission's purchases consistently exceeded the statewide purchasing goal for commodities in fiscal years 2015–2017, but failed to meet the statewide purchasing goal for other services.



The agency far exceeded the statewide purchasing goal for commodities in fiscal years 2015–2017.

## Appendix A

### Other Services



The agency fell below the state’s purchasing goal for other services in each of the last three fiscal years.

<sup>1</sup> All citations to Texas statutes are as they appear on <http://www.statutes.legis.texas.gov/>. Section 325.011(9)(B), Texas Government Code.

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

# APPENDIX B

## *Staff Review Activities*

During the review of the Texas Funeral Service Commission, Sunset staff engaged in the following activities that are standard to all Sunset reviews. Sunset staff worked extensively with agency personnel; attended commission meetings; conducted interviews and solicited written comments from interest groups and the public; reviewed agency documents and reports, state and federal statutes, legislative reports, previous legislation, and literature; researched the organization and functions of similar state agencies in other states; and performed background and comparative research.

In addition, Sunset staff also performed the following activities unique to this agency:

- Interviewed members of the Texas Funeral Service Commission
- Toured a mortuary science school and met with faculty and staff
- Observed inspections of funeral establishments
- Toured licensed funeral establishments and a crematory
- Conducted an online survey of stakeholders and evaluated responses from licensees, associations, schools, and members of the public
- Interviewed staff from various government agencies, including the Legislative Budget Board, Texas State Auditor's Office, Texas Department of Banking, Texas Department of Insurance, Department of State Health Services, Health Professions Council, State Office of Administrative Hearings, Texas Department of Licensing and Regulation, Texas Commission on Environmental Quality, office of the attorney general, and Department of Information Resources



# Sunset Staff Review of the *Texas Funeral Service Commission*

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