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Recurring Evidentiary Issues in Administrative Hearings at SOAH

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I. INTRODUCTION

Ever since the creation the State Office of Administrative Hearings (SOAH) in 1991,[1] and the codification of the old Administrative Procedure and Texas Register Act in the Texas Government Code as the newly-entitled Administrative Procedure Act (APA) two years later in 1993,[2] there have been several recurring evidentiary wrinkles peculiar to SOAH administrative hearings, which continue to plague SOAH litigators. This article attempts to delineate and explore some of the most common of these recurring evidentiary issues, and serve as a ready reference so that the recurrence of these evidentiary obstacles may be more readily anticipated and overcome.

II. WHAT EVIDENTIARY RULES APPLY AT SOAH?

Evidentiary rules which govern nonjury civil case[s] in … district court," including the Texas Rules of Evidence (TRE), apply equally in contested cases at SOAH.[3] However, other provisions of the APA,[4] the SOAH procedural rules,[5] several commentators,[6] and at least one court of appeals[7] seem to intimate that the Texas Rules of Civil Procedure (TRCP), as well as other evidentiary rules, also have full effect in SOAH proceedings.

While evidentiary rules applicable to a nonjury civil trial undoubtedly apply in SOAH contested case hearings, section 2001.081 of the APA carves out one major exception to this prefatory blanket-adherence language.[8] Therein, the APA allows that otherwise inadmissible evidence under the TRE "may be admitted if the evidence is:

> (1) necessary to ascertain facts not reasonably susceptible of proof under those rules;
> (2) not precluded by statute; and

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[1] *See* Act effective Sept. 1, 1991, 72nd Leg., R.S., ch. 591, 1991 Tex. Gen. Laws 2127 (codified as TEX. GOV'T CODE ANN. ch. 2003 (Vernon 2000 & Supp. 2006); *see also* Pete Schenkkan, *Texas Administrative Law: Trials, Triumphs, and New Challenges*, 7 TEX. TECH ADMIN. L.J. 287. 323, 323 n.105 (Summer 2006).

[2] Administrative Procedure Act, 73rd Leg., R.S., ch. 268, § 1, 1993 Tex. Gen. Laws 583, 735 (codified at TEX. GOV'T CODE ANN. ch. 2001 (Vernon 2000 & Supp. 2006).

[3] *See* TEX. GOV'T CODE ANN. § 2001.081 (Vernon 2000); *see also* R.R. Comm'n v. WBD Oil & Gas Co., 104 S.W.3d 69, 77 n.57 (Tex. 2003); 1 TEX. ADMIN. CODE § 155.51(a) (SOAH; Evidence).

[4] § 2001.083 ("In a contested case, a state agency shall give effect to the *rules of privilege recognized by law*.") (emphasis added); § 2001.091(a) ("subject to limitations of the kind provided for discovery under the *Texas Rules of Civil Procedure*") (emphasis added).

[5] 1 TEX. ADMIN. CODE § 155.31(b) (SOAH; Discovery).

[6] *See* James H. Barkley, *Post-Hearing Procedures*, *in* State Bar of Tex. Prof. Dev. Program, 18th Annual Advanced Administrative Law Course ch. 15, 2 n.16 (2006); Thomas B. Hudson, Jr., *Evidence Issues at SOAH*, *in* State Bar of Tex. Prof. Dev. Program, 15th Advanced Administrative Law Course 2003 ch. 8, 1 (2003); *see also* GOODE, WELLBORN AND SHARLOT, COURTROOM HANDBOOK ON TEXAS EVIDENCE, ch. 3 (2003).

[7] *See* Tex. Dep't of Pub. Safety v. Kimbrough, 106 S.W.3d 747, 751 (Tex. App.—Fort Worth 2003, no pet.) (holding that "[e]vidence admissible under the [TRE], *along with other necessary evidence that is not precluded by statute*, is admissible at license suspension hearings") (emphasis added).

[8] *See* TEX. GOV'T CODE ANN. § 2001.081 (Vernon 2000).

> (3) of a type on which a reasonably prudent person commonly relies in the conduct of the person's affairs.[9]

Acknowledging this legislative caveat provides Administrative Law Judges (ALJs) with seemingly sweeping evidentiary powers, the Third Court of Appeals, which—absent docket equalization[10]—hears the vast majority of administrative appeals by statute,[11] has noted "the standard for admissibility of evidence is broader for administrative proceedings than it is in the trial court."[12] The TRE provide for just this type of evidentiary exception as well, expressly recognizing the TRE apply "except as otherwise provided by statute."[13]

While this exception might appear to grant ALJs extremely expansive discretionary powers over what evidence they may deem admissible which district court judges cannot, in practice, the exception is "rarely used successfully,"[14] and "usually only when the proper predicate facts have been satisfactorily demonstrated."[15]

III. RECURRING EVIDENTIARY ISSUES

Some of the most frequently recurring evidentiary areas of angst regarding administrative proceedings at SOAH include: (1) judicial and official notice; (2) hearsay exceptions; and (3) discovery matters.

A. Judicial and Official Notice

i. Judicial notice

Judicial notice is an exception to the requirement of proving facts by presenting evidence, and therefore, it must be proved by a "high degree of indisputability."[16]

Beginning in 1892, Texas courts first began to follow the practice of taking judicial notice of "certain facts … because of their public notoriety and indisputable existence."[17] Later in 1967, the Texas Supreme Court added "well known and easily ascertainable"[18] facts to the "notorious and indisputable" judicial notice formulation first adopted in 1892.[19]

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[9] *See id.*; *see also* Hudson, *supra* note 6, at 1.

[10] The Texas Legislature authorized the Texas Supreme Court to equalize appellate dockets through the transfer of cases "from one court of appeals to another." *See* TEX. GOV'T CODE ANN. § 73.001 (Vernon 2005); *see also* Tex. Sup. Ct., Policies for Transfer of Cases Between Courts of Appeals, Misc. Docket No. 96-9224 (Oct. 24, 1996) (setting forth the policy for the transfer of cases between the courts of appeals); Andrew T. Solomon, *A Simple Prescription for Texas's Ailing Court System: Stronger Stare Decisis*, 37 ST. MARY'S L.J. 417, 457, 457 n.134 (2006).

[11] *See* TEX. GOV'T CODE ANN. § 2001.176(b)(1) (Vernon 2000) (holding that proper venue in contested case petitions for judicial review is in Travis County). The "Third Court of Appeals District is composed of the counties of … Travis." TEX. GOV'T CODE ANN. § 22.201(d) (Vernon Supp. 2006).

[12] Grubbs Nissan Mid-Cities, Ltd. v. Nissan N. Am., Inc., No. 03-06-00357-CV, 2007 Tex. App. LEXIS 4154 at *32 (Tex. App.—Austin 2007 May 23, 2007, pet. filed).

[13] TEX. R. EVID. 101(b).

[14] Dylan O. Drummond & Larry Temple, *Traps for the Unwary Administrative Lawyer*, *in* State Bar of Tex. Prof. Dev. Program, 17th Advanced Administrative Law Course ch. 11, 4 (2005).

[15] *See id.* (quoting Hudson, *supra* note 6, at 1).

[16] Hudson, *supra* note 6, at 2 (quoting O. Wellborn, *Judicial Notice Under Article II of the Texas Rules of Evidence*, 19 ST. MARY'S L.J. 1, 8 (1987)).

[17] L. Miller & Co. v. Tex. & New Orleans Ry. Co., 83 Tex. 518; 520, 18 S.W. 954, 954 (1892).

[18] *See* Barber v. Intercoast Jobbers & Brokers, 417 S.W.2d 154, 158 (Tex. 1967).

[19] Harper v. Killion, 162 Tex. 481, 483, 348 S.W.2d 521, 522 (1961) (quoting *Miller*, 83 Tex. at 520, 18 S.W. at 954).

Currently under Article II of the TRE, judicial notice may be taken of: (1) adjudicative facts;[20] (2) determinations of law of other states;[21] (3) determinations of the laws of foreign countries;[22] and (4) determinations of Texas city and county ordinances, the contents of the Texas Register[23] and the rules of agencies published in the Administrative Code.[24]

"Adjudicative facts" are those facts "not subject to reasonable dispute," because they are either: "(1) generally known within the territorial jurisdiction of the trial court[;] or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."[25] Adjudicative facts have also been described as "facts concerning the immediate parties—who did what, where, when, how and with what motive or intent."[26]

Because section 2001.081 of the APA provides that civil evidentiary rules apply equally in contested case hearings at SOAH,[27] adjudicative facts[28] and the text of both foreign and domestic laws may be judicially noticed.[29]

ii. Official notice

However, the APA provides an additional category of facts which may be noticed in SOAH proceedings.[30] Section 2001.090 of the APA allows ALJs to take "official notice" of "all facts that are judicially cognizable," as well as "generally recognized facts within the area of the state agency's specialized knowledge."[31] Some have described official notice as being "broader than judicial notice."[32] These judicially cognizable facts within an agency's specialized knowledge have also been termed "legislative facts," created "[w]hen a court or an agency develops law or policy, … [and thereby] act[s] legislatively."[33] These "facts which inform the tribunal's legislative judgment are called legislative facts."[34]

The difference between adjudicative and legislative facts has been explained by describing adjudicative facts as "'basic or underlying fact[s],'" and describing legislative facts as "'ultimate finding[s] of fact.'"[35] An agency has the most discretion

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[20] *See* TEX. R. EVID. 201.

[21] *See* TEX. R. EVID. 202.

[22] *See* TEX. R. EVID. 203.

[23] S*ee also* TEX. GOV'T CODE ANN. § 2002.022 (Vernon 2000) ("[t]he contents of the Texas Register are to be judicially noticed").

[24] *See* TEX. R. EVID. 204; *see also* TEX. GOV'T CODE ANN. § 2002.054 (Vernon 2000) ("[s]tate agency rules published in the administrative code … are to be judicially noticed").

[25] *See* TEX. R. EVID. 201.

[26] F. Scott McCown & Monica Leo, *When Can an Agency Change the Findings or Conclusions of an Administrative Law Judge?*, 50 BAYLOR L. REV. 65, 73 (1998) (quoting K.C. DAVIS, TREATISE ON ADMINISTRATIVE LAW § 15.03 at 353 (2d ed. 1979)).

[27] TEX. GOV'T CODE ANN. § 2001.081 (Vernon 2000).

[28] TEX. R. EVID. 201.

[29] TEX. R. EVID. 202-04.

[30] TEX. GOV'T CODE ANN. § 2001.090(a) (Vernon 2000).

[31] *Id*. It appears that the term, "official notice," is used intentionally by the Legislature to allow "agency members, who are not 'judges,'" per se, to "nonetheless hear contested cases and take 'official notice' of facts." *See* Hudson, *supra* note 6, at 2 n.4.

[32] Ray Langenberg, J. Woodfin "Woodie" Jones, *Administrative Law for Litigators—What You Need to Know to be Dangerous*, *in* State Bar of Tex. Prof. Dev. Program, 26th Advanced Civil Trial Course ch. 35, 6 (2003).

[33] McCown & Leo, *supra* note 26, at 73.

[34] *Id*.

[35] Drummond & Temple, *supra* note 14, at 4 (quoting Nancy L. Harlan, *Which Way is the Scale Tipped Now? The Shifting Balance of Power*

to change or reject a SOAH ALJ's conclusions of law, somewhat less discretion to alter findings of legislative facts, and the least discretion to alter findings of adjudicative facts.[36]

B. Hearsay Exceptions

Under APA section 2001.081, the TRE pertaining to hearsay apply equally to contested case hearings at SOAH.[37] TRE 801(d) provides that "hearsay" is a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[38]

There are two exceptions to the established hearsay rule—the public records and reports exception (the "public records exception")[39] and the records of regularly conducted activity exception (the "business records exception")[40]—that significantly recur in the administrative proceeding context.

i. Public records exception

Because state agency records are, by nature, almost always implicated in contested case hearings at SOAH, the most common hearsay exception pertinent to SOAH proceedings is the public records exception.

The public records exception excludes the following from being considered hearsay:

> Records, reports, statements, or data compilations, in any form, of public offices or agencies setting forth:
> (A) the activities of the office or agency;
> (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report …; or
> (C) in civil cases as to any party …, factual findings resulting from an investigation made pursuant to authority granted by law;
> unless the sources of information or other circumstances indicate lack of trustworthiness.[41]

While it may seem axiomatic that all documents in an agency's files are public records, that is not necessarily the case.[42] Only those documents which meet the requirements of TRE 803(8) qualify as public records entitled to protection from a hearsay objection.[43]

Moreover, TRE 805's caution regarding hearsay within hearsay is of particular import in the administrative hearing context.[44] Under TRE 805, "[h]earsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in [the TRE]."[45] If the agency document in question does "not satisfy the public records exception, a separate hearsay exception must

Between the Authority of Administrative Agencies and the State Office of Administrative Hearings Regarding Rulings in Contested Cases, 4 TEX. TECH J. TEX. ADMIN. L. 227, 232 (Summer 2003)).

[36] *See* Harlan, *supra* note 35, at 233.

[37] TEX. GOV'T CODE ANN. § 2001.081 (Vernon 2000).

[38] TEX. R. EVID. 801(d).

[39] TEX. R. EVID. 803(8).

[40] TEX. R. EVID. 803(6).

[41] TEX. R. EVID. 803(8).

[42] Hudson, *supra* note 6, at 4.

[43] *Id*.

[44] *See id*; *see also* TEX. R. EVID. 805.

[45] TEX. R. EVID. 805.

be found to admit the quoted or summarized portion."[46] Accordingly, "parties objecting to hearsay within a government record need to be prepared to provide line and page citations for the objectionable material."[47]

ii. Business records exception

The business records exception excludes the following from being considered hearsay:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by affidavit that complies with [TRE] 902(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. "Business" as used in this paragraph includes any and every kind of regular organized activity whether conducted for profit or not.[48]

As with the public records exception, not every document from a business's files will meet the business records exception.[49] In seeking to prove the elements of TRE 803(6), the movant should be mindful of the custodian of records affidavit, which may be used to prove the exception applies.[50] The custodian's affidavit requires that the documents sought to be excepted, as well as the affidavit, be filed fourteen days in advance of the SOAH hearing date with notice to opposing parties.[51]

C. Discovery Matters

i. Generally

Section 155.31 of the Texas Administrative Code, governing SOAH rules and procedures related to discovery, provides that, "[i]n contested cases, parties shall have the discovery rights provided in the APA, the referring agency's statute, and these rules."[52] However, for cases not adjudicated under the APA, discovery is only allowed as ordered by the judge.[53]

The scope of discovery allowed under the APA includes "any matter not privileged or exempted by the [TRCP], the [TRE], or other rule or law, that is relevant to the subject matter of the proceeding."[54]

Discovery may commence as soon as the case is docketed at SOAH, but may not be sought after the contested case hearing on the merits begins, absent a showing of good cause.[55]

Permissible types of discovery under the APA include: (1) requests for disclosure; (2) oral or written depositions; (3) written interrogatories to a party; (4)

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[46] Hudson, *supra* note 6, at 4.

[47] *Id*.

[48] TEX. R. EVID. 803(6).

[49] Hudson, *supra* note 6, at 4.

[50] *See* TEX. R. EVID. 902(10); *see also* Hudson, *supra* note 6, at 4.

[51] TEX. R. EVID. 902(10)(a).

[52] 1 TEX. ADMIN. CODE § 155.31(a) (SOAH; Discovery).

[53] *Id*.

[54] § 155.31(b).

[55] *See* § 155.31(c); *see also* Sarah G. Ramos & Nancy N. Lynch, *New SOAH Procedural Rules; Alternative Dispute Resolution Opportunities at SOAH*, *in* State Bar of Tex. Prof. Dev. Program, Advanced Administrative Law Course ch. G, G-2 (1998).

requests of a party for admission of facts and the genuineness or identity of documents or things; (5) requests and motions for production, examination, and copying of documents and other tangible materials; (6) motions for mental or physical examinations; and (7) requests and motions for entry upon and examination of real property.[56] Copies of discovery requests and answers to those requests "shall not be filed with SOAH unless directed by the judge or when in support of a motion to compel, motion for protective order, or motion to quash."[57] The ALJ may establish deadlines as necessary for discovery requests and responses, but if the ALJ does not establish a deadline, "responses to discovery requests, except for notices of depositions, shall be made within twenty days after receipt."[58]

It is interesting to note that, of these allowable categories of discovery, only requests for disclosure,[59] production,[60] and inspection[61] are expressly governed by the TRCP.[62] However, some agencies—such as the Texas Commission on Environmental Quality (TCEQ) or the Public Utility Commission (PUC)—have enacted their own discovery rules, which specifically provide that discovery before those agencies be conducted pursuant to the TRCP.[63] and/or the TRE.[64] In addition, some of these agencies which have enacted their own discovery rules have even limited the scope of discoverable evidence.[65] It is therefore advisable that administrative litigators consult an individual agency's rules—much like civil litigators consult a court's local rules—before undertaking a contested case matter at SOAH.

ii. Depositions

One of the biggest peculiarities to administrative discovery, as compared to its civil counterpart, is the procedure for noticing and taking the deposition of a witness. Under TRCP 199.2, a party need only serve a "notice of intent to take an oral deposition upon the witness and all parties a reasonable time before the deposition is taken,"[66] which may include a request for production of documents (traditionally referred to as a subpoena duces tecum),[67] in order to take a deposition. However, under section 2001.094 of the APA, a party must seek a commission authorizing the issuance of a subpoena from the referring agency involved in the contested case hearing, requiring the witness sought to be deposed appear and produce any requested documents at the time of the deposition.[68]

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[56] § 155.31(d).

[57] § 155.31(f).

[58] § 155.31(g).

[59] *Id*. ("as described by [TRCP] 194").

[60] *See* TEX. GOV'T CODE ANN. § 2001.091(a) (Vernon 2000); *see also* Ramos & Lynch, *supra* note 55, at 5.

[61] *Id*.

[62] *But see* 1 TEX. ADMIN. CODE § 155.31(k) (SOAH; Discovery) ("Every disclosure, discovery request, notice, response, and objection must be signed by the party's authorized representative or the party, if the party is not represented. The signature of the party or the party's authorized representative shall have the effect specified by the [TRCP] 191.3.").

[63] *See* 16 TEX. ADMIN. CODE § 22.141(a) (PUC; Forms and Scope of Discovery); 30 TEX. ADMIN. CODE § 80.151 (TCEQ; Discovery Generally).

[64] 16 TEX. ADMIN. CODE § 22.141(a) (PUC; Forms and Scope of Discovery).

[65] *See, e.g.*, 30 TEX. ADMIN. CODE § 80.151 (TCEQ; Discovery Generally) ("Drafts of prefiled testimony are not discoverable."); *but see* 1 TEX. ADMIN. CODE § 155.51(c) (SOAH; Evidence) (allowing the production of prefiled testimony).

[66] TEX. R. CIV. P. 199.2(a).

[67] TEX. R. CIV. P. 199.2(b)(5).

[68] *See* TEX. GOV'T CODE ANN. § 2001.094(a)-(b) (Vernon 2000); *see also* 1 TEX. ADMIN. CODE § 155.31(e) (SOAH; Discovery).

Witnesses preferring not to be deposed may seek a protective order from a deposition subpoena, which the ALJ may issue "in the interest of justice necessary to protect the person or party seeking relief from undue burden, unnecessary expense, harassment or annoyance, or invasion of personal, constitutional, or property rights."[69]

While the APA provides a general catch-all procedure for obtaining deposition subpoenas,[70] some agencies have been delegated subpoena power of their own, and have enacted rules governing the taking of depositions pursuant to a subpoena issued from their respective agencies.[71] Again, administrative litigators should consult the referring agency's rules before seeking to depose a witness in a contested case hearing.

iii. Requests for admissions

The final area of recurring discovery issues concerns the SOAH rules governing requests for admissions.[72] Section 155.31 of the SOAH discovery rules provide that request for admission may be had regarding "admission of facts and the genuineness or identity of documents or things."[73] Moreover, no later than twenty days before the end of the discovery period, a party may request the admission of the truth of any matters not privileged or exempted by the TRCP, TRE, or other rule or law, that are relevant to the subject matter of the proceeding, and which "relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request."[74]

The requirements regarding answers to administrative requests for admission largely follow TRCP 198.2(b)'s provisions concerning the contents of responses to requests for admissions, but also include some additional stringent requirements as well.[75] Under section 155.31(d)(2)(A) of the SOAH discovery rules, answers to requests for admissions "shall specifically deny the matter or set forth in detail the reasons that the answering party cannot truthfully admit or deny the matter."[76] However, the more exacting portion of section 155.31(d)(2)(A) requires that:

> A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify its answer and deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder.[77]

Moreover, section 155.31(d)(2)(A) provides that:

> An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless it states that it has made reasonable inquiry and that the information known or easily

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[69] *See* 1 TEX. ADMIN. CODE § 155.31(m) (SOAH; Discovery); *see also, e.g.*, 16 TEX. ADMIN. CODE § 22.142 (PUC; Limitations on Discovery and Protective Orders).

[70] TEX. GOV'T CODE ANN. § 2001.094(a)-(b) (Vernon 2000).

[71] *See, e.g.*, 16 TEX. ADMIN. CODE § 22.143 (PUC; Depositions); 30 TEX. ADMIN. CODE § 80.153 (TCEQ; Issuance of Subpoena or Commission To Take Deposition).

[72] *See* 1 TEX. ADMIN. CODE § 155.31(d) (SOAH; Discovery).

[73] *Id.*

[74] § 155.31 (b), (d)(2).

[75] *Compare* § 155.31(d)(2)(A), *with* TEX. R. CIV. P. 198.2(b).

[76] 1 TEX. ADMIN. CODE § 155.31(d)(2)(A) (SOAH; Discovery).

[77] *Id.*

> obtainable by it is insufficient to enable it to admit or deny.[78]

The SOAH discovery rules governing objections to administrative requests for admissions are equally rigorous. Under penalty of sanction:[79]

> A party who considers that a matter of which an admission is requested presents a genuine issue for hearing may not, on that ground alone, object to the request; it may … deny the matter or set forth reasons why the party cannot admit or deny it.[80]

The unique importance that requests for admissions serve in administrative contested case hearings is revealed by the SOAH discovery rules, which provide that "[a]ny matter admitted under this section is conclusively established."[81] Only upon motion to the ALJ showing good cause in the interest of justice, and only if the ALJ "finds that the parties relying upon the responses and deemed admissions would not be unduly prejudiced and that the presentation of the merits of the action will be subserved thereby," may an ALJ permit withdrawal or amendment of a deemed administrative admission.[82]

IV. CONCLUSION

While contested case proceedings at SOAH have inherent evidentiary pitfalls of which one must be aware, keeping abreast of both the SOAH and referring agency's rules, as well as the APA's provisions pertaining to judicial and official notice, the public records and business records exceptions, and the idiosyncrasies surrounding administrative depositions and requests for admissions, among others, will help ensure an administrative litigator uses these procedural oddities to his or her advantage.

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[78] *Id.*

[79] *See* TEX. GOV'T CODE ANN. § 2003.0421 (Vernon 2000).

[80] 1 TEX. ADMIN. CODE § 155.31(d)(2)(A) (SOAH; Discovery).

[81] § 155.31(d)(2)(B).

[82] *Id.*