

4

To: Jessica Schleifer
Director, Senate Committee on Open Government

From: John Furge
Member of Freedom of Information Foundation of Texas (FOIFT)
President of the Texas Association of CPAs (TACPA)

Date: November 26, 2012

Re: Written Testimony on Interim Charge 1 – Privatization, and
Interim Charge 4 – Frivolous Open Records Request.

Dear Ms. Schleifer:

Thank you for this opportunity to provide testimony to the Honorable Open Government Committee on the topic of open records in Texas

There are two issues I wish to address:

Charge 1 - PRIVATIZATION:

(1) Privatization - Defined:

- a. I have witnessed first hand privatization of a Texas Agency under the Self-Directed Semi-Independent Agency statute (Vernon's Civil Statutes Art. 8930. Self-Directed Semi-Independent Agency Project Act), hereafter referred to as SDSI.
- b. There are three agencies subject to this 1999 pilot project,
 - i. The Texas State Board of Public Accountants (TSBPA),
 - ii. The Texas Board of Professional Engineers, and
 - iii. The Board of Architectural Examiners.
- c. The SDSI act under Vern Art. 8930 was recently reported on by the Texas Sunset Commission, and that report is available on the Sunset Commission's website under "current reports".
- d. Effective September 1, 2011, The Texas Real Estate Commission is now a SDSI agency, but was under created by the 82nd legislature, Chapter 1105 of the Texas Occupation Code.
- e. There are other agencies that have been granted the SDSI status but it is sufficient to know they exist and their number is increasing.
- f. Under both statutes referenced above, the agencies are required to comply with the Government Code Sections 551, and 552 (Open Meetings and Open Records, respectively).

(2) Open Records and Privatization:

- a. While dealing with the TSBPA, in open records request, I have encountered fee increases that completely stifle the ability to get information from the agency.
- b. This is due to the agency using the SDSI statute language in-inappropriately to state they must cover cost, as they do not go through the appropriations process, and that is the justification for deviating from the Attorney General's cost schedule.
 - i. The TSBPA requested an exemption from the Cost Rules Administrator at the Attorney General's Open Records Division, stating they were an SDSI agency and thusly, they had to cover their cost. **[Exhibit A - documents relative to the exemption from the AG's cost schedule]**
 - ii. The TSBPA has a large fund balance they are trying to spend down. So, there was no threat to their ability to fund the request under the Attorney General's rules for determining charges to obtain public information. **[Exhibit B - newspaper article on the excessive fund balance from the AP news wire]**
- c. An SDSI agency should be required to build in the cost of open government in its budgeting process and fee setting schedules.
 - i. For example, specific language should be included in the SDSI Statutes, or in GC Sec 552 that an SDSI agency may not claim exemption (pursuant to Tex. Govt. Code 552.262(c)) from Attorney General's rules for determining charges to obtain public information.
 - ii. If an agency is granted the benefits of revenue-setting that SDSI grants, it should not be able to impose extraordinary costs for public access to information.

Charge 4 - FRIVOLOUS OPEN RECORDS REQUEST:

- (1) First, I don't believe this topic can co-exist with open government.
- (2) State Agencies, and other agencies subject to the act charge for the records they provide, and if there is a large single request, or a series of small and persistent request, the agency in question is charging for each one.
 - a. The agency should follow current procedure, but if they cannot meet the deadlines, then file with the AG's office and ask for an extension of time
 - b. Then too, if the agency complies with a so-called frivolous request, they should have a policy in place that requires said information is posted to their web site to avoid having to provide it again.
 - c. As technology increases storage capacity and retrieval rates, the cost of providing information is coming down. However, if the agency is managing its information inefficiently, any open records request will appear overly burdensome, and therefore frivolous.

John Furge Contact Information:

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Plano, Texas 75023



Texas State Board of Public Accountancy

333 Guadalupe, Tower III Suite 900, Austin, Texas 78701-3900

William Treacy, Executive Director
November 3, 2010

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OPEN RECORDS DIVISION

Mrs. Hadassah Schloss
Cost Rules Administrator
Open Records Division
Office of the Attorney General
209 W. 14th, 6th Floor
Austin, TX 78701

ML-398814-10
406344

Dear Mrs. Schloss:

This is in response to our phone conversation of October 27, 2010, concerning this agency's request for an exemption from the Office of the Attorney General's rules (Rule 70.3) concerning the charge for the sale of public information.

We are requesting this exemption pursuant to V.T.C.S., Article 8930, Self-Directed Semi-Independent Agency Project Act, Section 6 (a), which provides in part:

No costs shall be incurred by the general revenue fund. A project agency shall be responsible of all costs, both direct and indirect.

Additionally, this exemption is requested pursuant to Board Rule 521.6, *Duplication and Other Charges and Refund of Board Fees*, which provides in part:

- (1) *Personnel charges will be the actual salary rate of attributable staff plus fringe benefits.*
- (2) *Overhead charges will be determined on an actual cost recovery basis.*

We are requesting the authority to charge for the actual cost of responding to open records requests which involve non-readily accessible documents. In responding to such requests, the actual costs for personnel time would be based on the hourly salary rate of the staff personnel who are responsible for locating and compiling the requested records (from approximately \$21.17 to \$59.42 per hour) and the overhead rate of approximately \$56.99 per hour.

Enclosed is the cost calculation for mailing lists worksheet and the departmental overhead worksheet. In response to previous correspondence from you, labor and overhead are based on time spent producing the mailing lists, as opposed to time spent in development.

If you have any questions, please call me at 305-7814.

Sincerely,

TEXAS STATE BOARD OF
PUBLIC ACCOUNTANCY

Alan L. Hermanson, CPA
Director of Administrative Services/CFO

SCHLOSS12

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Automated
Information
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CPE
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Enforcement
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(512) 305-7854

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Exhibit A.1



Texas State Board of Public Accountancy

333 Guadalupe, Tower III Suite 900, Austin, Texas 78701-3900

William Treacy, Executive Director

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OPEN RECORDS DIVISION

August 5, 2010

ML-398814-10
398814

Mrs. Hadassah Schloss
Cost Rules Administrator
Open Records Division
Office of the Attorney General
209 W. 14th, 6th Floor
Austin, TX 78701

Dear Mrs. Schloss:

In accordance with Section 552.262, Texas Government Code, the Texas State Board of Public Accountancy hereby requests an exemption from the Office of the Attorney General's rules (Rule 70.3) concerning the charge for the sale of public information. This exemption is requested pursuant to V.T.C.S., Article 8930, Self-Directed Semi-Independent Agency Project Act, Section 6 (a), which provides in part:

No costs shall be incurred by the general revenue fund. A project agency shall be responsible of all costs, both direct and indirect.

If you have any questions, please call me at 305-7801 or Alan Hermanson at 305-7814.

Sincerely,

TEXAS STATE BOARD OF
PUBLIC ACCOUNTANCY

WILLIAM TREACY
Executive Director

AH:SCHLOSS11

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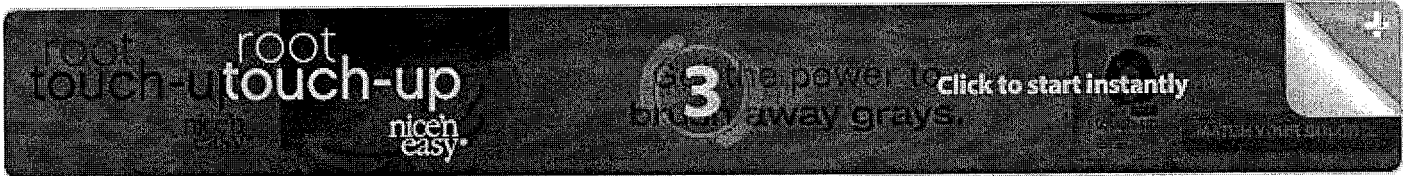
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Exhibit A.2



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Texas board hoards millions amid state budget gap

By DANNY ROBBINS
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May 22, 2011, 1:33PM

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DALLAS — At a time when state agencies are slashing budgets, an obscure Texas board is sitting on a pile of cash that can't be touched by lawmakers under a little-known program that has caught the attention of other agencies seeking similar privileges and caused some to believe it taints the regulatory process.

Records examined by The Associated Press show that the Texas State Board of Public Accountancy has been stockpiling millions of dollars for the better part of a decade under a pilot program that allows it to fund itself through the fees and fines it collects.

Since 2002, the board has built a fund balance that's grown from just more than \$500,000 to more than \$5 million, a figure surpassing its entire annual budget. Three years ago, the agency had nearly \$7 million the bank.

Six other state agencies have similar financial autonomy, but none has accumulated surpluses at the rate of the accounting board. Influenced in large measure by the board, three more agencies in Texas have sought that status this year from the Legislature, although only one, the state Real Estate Commission, appears likely to get it.

"They've shown how you can take a state agency and apply private business practices and protect the public," said Mark Majek, operations director for the Texas Board of Nursing, one of the agencies up for consideration.

The accounting board's executive director, William Treacy, says the ability to build a hefty fund balance has given the agency the clout to put a dent in corporate wrongdoing, including matters stemming from the Enron scandal.

But for some familiar with the board's decisions, there's a growing sentiment that its method of funding has injected the profit motive into an area where it doesn't belong.

"Would you want to be subject to being stopped by traffic police whose pay increase depends on generating revenue for the police department?" said Susan Henricks, an Austin attorney who has represented certified public accountants before the board.

The pilot program, approved by the Legislature in 1999 and initiated in 2001, made the accounting board as well as two others that oversee architects and engineers self-directed, semi-independent agencies. Since then, four other agencies, all tied to banking and finance regulation, have gained similar status.

The agencies don't receive legislative appropriations. Instead, they pay annual subsidies to the state and keep the rest of the money they collect. That means their excess funds aren't "swept" by the Legislature at the end of each two-year budget cycle.

Independent or semi-independent agencies have operated for years in various states. Advocates say such autonomy allows regulatory bodies to be more efficient because they can hire personnel and gain other critical resources without seeking legislative approval.

Accounting boards have been particularly aggressive in seeking independent status, and building a surplus of funds is a necessary practice, industry officials say.



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"I know that can be a sensitive matter," said Bucky Glover, a certified public accountant who sits on the state board in North Carolina, which has operated autonomously since 1983. "But when you start investigating these complex cases, you need some horsepower."

Eva Deluna Castro, senior budget analyst for the Austin-based Center for Public Policy Priorities, said the amount being held by the Texas accounting board is tiny in comparison to the state's \$27 billion budget shortfall. Still, she said she was unaware that one state agency was making — and keeping — that sort of money.

"If they have as much in their (balance) as they're spending every year, that's unusual," said Deluna Castro, whose organization tracks Texas social and economic issues.

While the board's fund balance has grown, its expenditures on major cases have remained flat, never exceeding more than \$1 million in a single year, records show.

Treacy said stockpiling the money has allowed the board to reach settlements in cases related to Enron and other scandals that otherwise would have been fought in court.

"The mere existence of our funding, which is public information, sent the message to those we investigated that we had the ability to carry out our responsibility," he wrote in an e-mail to the AP.

Treacy, who declined to be interviewed, said the board has been reducing the surplus by cutting licensing fees, although it continues to pursue cases "that require a larger than normal" balance.

The board's budget for the current year reflects a reduction in the balance of \$620,000.

Former state representative and House Appropriations Committee Chairman Talmadge Heflin said the board represented to the Legislature that it needed independence because it was "outgunned." That so much money is remaining with the agency "raises the question, 'Are the fights really out there?'" said Heflin, now director of the Texas Public Policy Foundation's Center for Fiscal Policy.

The board's funding has frequently drawn complaints from accountants working for themselves or small firms. They claim the system allows the agency to get away with excessive fines.

"If it's an issue that would set a precedent they don't like, they're going to fight you until the end of the earth," said John Furge, president of the Texas Association of CPAs, a trade association of about 200 small or medium-sized firms. "They've got \$5 million. You don't."

About half the states have accounting boards deemed independent or semi-independent, according to the National Association of State Boards of Accountancy. The Texas and North Carolina boards are generally considered the most autonomous, and Treacy is well known as an advocate, according to industry officials.

"(Independence) has worked out well for Texas, and Bill Treacy has shared that," said Thomas Kenney, a spokesman for the national association.

Robert Brooks, executive director of the North Carolina board, said his agency currently has about \$2.5 million in reserve. He said the fund is mainly in case the board has to settle a lawsuit, not to show its muscle.

"We don't use that philosophy here," Brooks said.

The Texas Board of Nursing has long sought financial autonomy and is willing to pay the state an annual subsidy of \$5.7 million — more than eight times what the accounting board pays — to get it.

Majek said the board wants to be protected from state-mandated financial constraints that have caused licensing and investigating delays. He said he understands the "perception" that goes with having the ability to hoard funds, but he believes his agency would be better served operating outside the appropriations process.

"Our resources are hampered by the fact that, if there's a state downturn, then we have to give money back," Majek said. "That's the downside of being part of the state."

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Exhibit B.2