

State of Texas

Forensic Science Commission

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TEXAS FORENSIC SCIENCE COMMISSION

POLICIES AND PROCEDURES

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1.0 Texas Forensic Science Commission (“FSC” or “Commission”)

The investigative mission of the FSC is to strengthen the use of forensic science in Texas by conducting thorough and fair investigations, encouraging forensic development, and recommending legislative improvements.¹ The Commission is also responsible for accrediting crime laboratories and licensing forensic analysts (effective January 1, 2019). The licensing and accreditation programs are summarized in Sections 5 and 6 of these Policies and Procedures. Because the Commission has rulemaking authority with respect to these programs, interested parties should consult the Commission’s administrative rules for details and current information on licensing and accreditation.

1.1 Investigative Duties

(a) The FSC is charged by statute to:

- (1) develop and implement a reporting system through which crime laboratories may report professional negligence or professional misconduct;
- (2) require crime laboratories that conduct forensic analyses to report professional negligence or professional misconduct to the Commission²;
- (3) investigate, in a timely manner, any allegation of professional negligence or professional misconduct that would substantially affect the integrity of the results of a forensic analysis conducted by a crime laboratory; and
- (4) initiate for educational purposes investigations of forensic analyses without receiving a complaint where the Commission determines by majority vote of a quorum of the members that an investigation of the forensic analysis would advance the integrity and reliability of forensic science in Texas.³

(b) An investigation under Subsection (a)(3):

- (1) must include the preparation of a written report that identifies and also describes the methods and procedures used to identify:
 - (A) the alleged negligence or misconduct;
 - (B) whether negligence or misconduct occurred;
 - (C) any corrective action required of the laboratory, facility, or entity;
 - (D) observations of the Commission regarding the integrity and reliability of forensic analysis conducted;
 - (E) best practices identified by the Commission during the course of the investigation; and
 - (F) other relevant recommendations, as determined by the Commission.

¹ The Texas Legislature created the FSC during the 79th Legislative Session by passing House Bill 1068 (the “Act”). The Act amended the Texas Code of Criminal Procedure to add Article 38.01, which describes the composition and authority of the Commission. *See* Act of May 30, 2005, 79th Leg., R.S., ch. 1224, § 1, 2005. During the 83rd and 84th Sessions, the Legislature further amended the Code of Criminal Procedure to clarify and expand the Commission’s jurisdictional authority. *See* Acts 2013, 83rd Leg. ch. 782 (S.B. 1238), §§ 1 to 4, eff. June 14, 2013; Acts 2015, 84th Leg., ch. 1276 (S.B. 1287), §§ 1 to 7, eff. September 1, 2015, (except TEX. CODE CRIM. PROC. art. 38.01 § 4-a(b) which takes effect January 1, 2019). These written policies and procedures are intended to consolidate a description of the Commission’s authority and provide a guide for the consistent exercise of the discretion and authority of the FSC.

² *See* FSC Crime Laboratory Disclosure Guidelines attached as Appendix A.

³ TEX. CODE CRIM. PROC. art. 38.01 § 4(a).

(2) It may include one or more:

(A) retrospective reexaminations of other forensic analyses conducted by the laboratory, facility, or entity that may involve the same kind of negligence or misconduct; and

(B) follow-up evaluations of the laboratory, facility, or entity to review:

(i) the implementation of any corrective action required under Subdivision (1)(C); or

(ii) the conclusion of any retrospective reexamination under Paragraph (A).⁴

(c) If the Commission conducts an investigation of an unaccredited crime laboratory or the investigation is conducted pursuant to an allegation involving a forensic method or discipline that is not an accredited field of forensic science, or the investigation is initiated by the Commission for educational purposes, any resulting investigative report must be limited to:

(A) observations of the Commission regarding the integrity and reliability of the forensic analysis conducted;

(B) best practices identified by the Commission during the course of the investigation; or

(C) other relevant recommendations, as determined by the Commission.⁵

(d) The Commission by contract may delegate the duties described by subsections (a)(3) and (a)(4) above.

(e) The Commission may require that a crime laboratory investigated under (a)(3) or (a)(4) pay any costs incurred to ensure compliance with (b) and (c) above.

(f) The Commission shall make all investigation reports completed under subsections (b) and (c) available to the public. A report completed under subsections (b) or (c), in a subsequent civil or criminal proceeding, is not prima facie evidence of the information or findings contained in the report.

(g) The Commission may not make a determination of professional negligence or professional misconduct unless the allegation or laboratory disclosure concerns an accredited forensic discipline *and* an accredited crime laboratory.

(h) The Commission may not issue a finding related to the guilt or innocence of a party in an underlying civil or criminal trial involving conduct investigated by the Commission.

(i) The Commission may review and refer cases that are the subject of an investigation to the office of capital and forensic writs in accordance with Section 78.054(b) of the Texas Government Code.

⁴ See TEX. CODE CRIM. PROC. art. 38.01 § 4(b).

⁵ See TEX. CODE CRIM. PROC. art. 38.01 § 4(b-1).

1.2 Definitions

“Accredited field of forensic science” means a specific forensic method or methodology validated or approved by the Commission under TEX. CODE CRIM. PROC. art. 38.01 § 4-d, as part of the accreditation process for crime laboratories.⁶

“Commission” means the Texas Forensic Science Commission.⁷

“Criminal action” means an investigation, complaint, arrest, bail, bond, trial, appeal, punishment, or other matter related to conduct proscribed by a criminal offense.⁸

“Crime Laboratory” means a public or private laboratory or other entity that conducts a forensic analysis subject to this article.⁹

“Forensic analysis” means a medical, chemical, toxicological, ballistic, or other expert examination or test performed on physical evidence, including DNA evidence, for the purpose of determining the connection of the evidence to a criminal action. The term expressly excludes the portion of any autopsy conducted by a medical examiner or other forensic pathologist who is a licensed physician.¹⁰

“Physical evidence” means any tangible object, thing, or substance relating to a criminal action.¹¹

“Professional Misconduct” means the actor, through a material act or omission, deliberately failed to follow the standard of practice generally accepted at the time of the forensic analysis that an ordinary forensic professional or entity would have exercised, and the deliberate act or omission would substantially affect the integrity of the results of a forensic analysis. An act or omission was deliberate if the actor was aware of and consciously disregarded an accepted standard of practice required for a forensic analysis.

“Professional Negligence” means the actor, through a material act or omission, negligently failed to follow the standard of practice generally accepted at the time of the forensic analysis that an ordinary forensic professional or entity would have exercised, and the negligent act or omission would substantially affect the integrity of the results of a forensic analysis. An act or omission was negligent if the actor should have been but was not aware of an accepted standard of practice required for a forensic analysis.

Note: The term “would substantially affect the integrity of the results of a forensic analysis” does not necessarily require that a criminal case be impacted or a report be issued to a customer in error. The term includes acts or omissions that would call into question the integrity of the forensic analysis, the individual forensic examiner, or the laboratory as a whole regardless of outcome on the underlying criminal case. For additional guidance, *see* Appendix A.

⁶ TEX. CODE CRIM. PROC. art. 38.01 § 2(1).

⁷ TEX. CODE CRIM. PROC. art. 38.01 § 2(2).

⁸ *See* TEX. CODE CRIM. PROC. art. 38.35 § (a)(2).

⁹ *See*, TEX. CODE CRIM. PROC. art. 38.35 § (a)(1).

¹⁰ TEX. CODE CRIM. PROC. art. 38.01 § 2(4).

¹¹ *See* TEX. CODE CRIM. PROC. art. 38.35 § (a)(5).

2.0 Membership

(a) The FSC is composed of nine members, appointed by the governor as follows:

- (1) two members must have expertise in the field of forensic science;
- (2) one must be a prosecuting attorney that the governor selects from a list of 10 names submitted by the Texas District and County Attorneys Association;
- (3) one must be a defense attorney that the governor selects from a list of 10 names submitted by the Texas Criminal Defense Lawyers Association;
- (4) one must be a faculty member or staff member of The University of Texas who specializes in clinical laboratory medicine selected from a list of 5 names submitted to the governor by the chancellor of The University of Texas System;
- (5) one must be a faculty member or staff member of Texas A&M University who specializes in clinical laboratory medicine selected from a list of 5 names submitted to the governor by the chancellor of The Texas A&M University System;
- (6) one must be a faculty member or staff member of Texas Southern University selected from a list of 5 names submitted to the governor by the chancellor of Texas Southern University;
- (7) one must be a director or division head of the University of North Texas Health Science Center at Fort Worth Missing Persons DNA Database; and
- (8) one must be a faculty or staff member of the Sam Houston State University College of Criminal Justice and have expertise in the field of forensic science selected from a list of 5 names submitted to the governor by the chancellor of Texas State University System.¹²

(b) Each member of the FSC serves a staggered two-year term subject to reappointment. Members are appointed to terms beginning on September 1st. The term of the members appointed under Sections (1)-(6) above expire on September 1 of each odd-numbered year. The term of the members appointed under Sections (7)-(8) above expire on September 1 of each even-numbered year.¹³

(c) The Governor designates a presiding officer (“Chair”). The Chair may nominate other officers including a vice-chair and committee chairs, subject to the approval of other Commission members.¹⁴

(d) The names and terms of the members shall be listed on the FSC website at www.fsc.state.tx.us.

(e) A person who is appointed to and qualifies for office as a member of the FSC shall receive an orientation from the Chair and staff that provides the person with information regarding:

¹² See TEX. CODE CRIM. PROC. art. 38.01 § 3(a).

¹³ See TEX. CODE CRIM. PROC. art. 38.01 § 3(b).

¹⁴ See TEX. CODE CRIM. PROC. art. 38.01 § 3(c).

- (1) the legislation that created the FSC and related laws;
- (2) the policies and procedures of the FSC, as described in this document and any associated documents generated by the FSC or staff;
- (3) the current budget for the FSC;
- (4) the requirements of:
 - (A) The Open Meeting Act , Government Code Chapter 551;
 - (B) The Public Information Act, Government Code Chapter 552; and
 - (C) other laws relating to public officials, including conflict of interest laws; and
- (5) the minutes of the meetings of the FSC; and
- (6) any pending complaints, disclosures or ongoing investigations.

2.1 Meetings

(a) The FSC shall hold at least quarterly meetings and additional meetings at the call of the Chair. The Chair of the FSC shall conduct FSC meetings and may designate the dates, times and places of meetings following consultation with Commission members. The Vice Chair shall conduct FSC meetings in the Chair's absence.

(b) Notice of the meeting and the meeting agenda shall be made available to the FSC members, advisory members, and other interested parties in advance of each FSC meeting and shall be posted with the Office of Secretary of the State and on the FSC meeting webpage.

(c) A quorum of the FSC is five members. A quorum is required for formal action by the FSC. Formal action may be approved by a majority vote of the members present and voting.

(d) The Chair shall establish the agenda for each meeting after consultation with the full FSC and staff.

(e) To increase public access, the Commission will endeavor to live-stream all of its quarterly meetings on its website at www.fsc.state.tx.us. Decisions to live-stream any particular meeting do not guarantee all meetings will be live-streamed. The ability to live-stream depends on budgetary constraints and logistical factors at any given meeting.

2.2 Committees

(a) The FSC shall have three standing committees: Complaint and Disclosure Screening, Forensic Development, and Legislative. The FSC Chair shall nominate three members of the FSC for each standing committee, subject to the approval of the full FSC. Each committee shall elect a member to serve as chair of the committee. The FSC Chair also may form additional committees, panels or workgroups as needed.

(b) A quorum of a committee is two members, and a quorum is required for a committee to meet and take action. The actions of any committee are not final and serve only as recommendations to the full FSC.

(c) Because complaints reviewed by the Complaint and Disclosure Screening Committee are of inherent interest to the public, the Committee shall hold all of its meetings as open

public meetings. The notice rules set forth under the Open Meetings Act shall be used for these meetings.

(d) The FSC may, by majority vote of a quorum of its members, elect a member of the Texas Association of Crime Laboratory Directors (TACL D) to serve as a non-voting member of the Forensic Development Committee. The TACL D member shall remain a member of the Committee until he or she requests removal or until a majority of the FSC votes to remove him or her.

3.0 Processing of Complaints and Laboratory Self-Disclosures

(a) The FSC shall approve forms for complaints and laboratory self-disclosures and make them available on the FSC website. As further described below, complaints and disclosures are initially reviewed by the Complaint and Disclosure Screening Committee, approved for investigation by the full FSC, investigated through an Investigation Panel, which may include outsourced investigative resources, and completed in the form of a report adopted by the full FSC.

(b) Complaints and disclosures shall be considered initially through the Complaint and Disclosure Screening Committee. The chair of the Committee shall present the complaints and disclosures before the FSC with a recommendation for disposition. The Committee may recommend the following dispositions:

- (1) dismiss the complaint or disclosure;
- (2) accept the complaint or disclosure and submit for action by an Investigation Panel;
- (3) recommend the FSC use its discretion to review the matter for educational purposes;
- (4) recommend no further action by the laboratory is necessary at this time; or
- (5) take such other action as appropriate.

(c) The Complaint and Disclosure Screening Committee may assign staff to collect preliminary information related to a complaint or disclosure, including research into the status of any underlying criminal or civil case and whether the complaint or disclosure addresses a forensic analysis subject to investigation by the FSC. In addition, an actor named in a complaint or disclosure and the involved accredited laboratory, facility or entity may be given an opportunity but is not required to provide a written reply, offering any reasons for or against accepting the complaint or designating the disclosure for investigation. The following factors may be considered when a complaint or disclosure is screened by the Committee and considered by the FSC:

- (1) whether the FSC has jurisdiction;
- (2) the availability of the person who was the defendant in the criminal action associated with the forensic evidence;
- (4) the availability of any actor who conducted any part of the forensic analysis;
- (5) the length of time between the forensic analysis and the complaint or disclosure;
- (6) the availability of records in connection with the forensic analysis and any associated litigation;

- (7) the status of any criminal case or civil litigation associated with the forensic analysis;
- (8) the potential for additional relevant forensic analysis;
- (9) any other factor that would enhance or detract from a complete and accurate investigation of the forensic analysis and any alleged negligence or misconduct;
- (10) the availability of funds to complete an investigation; and
- (11) the opportunity for the investigation and report to educate the forensic science community, advance the standards and training associated with such a forensic analysis or identify legislative recommendations for strengthening a field of forensic science.

(d) Upon reaching a recommended initial disposition for a complaint or disclosure, the Committee shall provide a summary of the recommendation to the Commission.

(e) Following action by the full FSC regarding the disposition of a complaint or disclosure, the FSC shall notify the complainant, actor involved in the forensic analysis and the laboratory, facility or entity of the disposition.

(f) To ensure thorough consideration of all complaints and self-disclosures, complainants and laboratories submitting disclosures should make such submissions at least fifteen (15) business days before a particular quarterly Commission meeting to have the complaint or disclosure considered at that meeting. The Commission reserves the right to consider any complaint or disclosure that does not meet the 15-day deadline at the next quarterly meeting.

(g) A member of the Commission may, by formal motion, request that the full Commission reconsider a dismissed complaint or disclosure if the member identifies new evidence of professional negligence or professional misconduct that was not previously considered by the Commission. The new evidence may be derived from either:

- (1) Information in the existing record that the complainant believes was not considered by the Commission previously; or
- (2) New information brought to the Commission's attention that was not previously considered by the Commission.

(h) A motion described in this section may be made only if the Commissioner believes in good faith that the information will have a material impact on the Commission's analysis of the complaint or disclosure pursuant to the screening criteria set forth in 3.0.

(i) After considering the member's motion, the Commission shall vote to:

- (1) Affirm the original decision to dismiss the complaint or disclosure; or
- (2) Re-open the complaint or disclosure.

(j) The Commission shall notify the complainant and the appropriate laboratory, facility or entity in writing of the results of the Commission's vote under Subsection (h).

(k) The Commission shall conduct an appropriate investigation of a complaint or disclosure reopened under Subsection (i)(2).

(l) The General Counsel may dismiss complaints related to the portion of an autopsy conducted by a medical examiner or licensed physician as falling outside the

Commission's statutory jurisdiction without bringing the complaint before the Complaint Screening Committee or full FSC for consideration.

(m) The General Counsel may refer complaints and requests involving DNA mixtures to the statewide DNA Mixture Review Team or other responsible entity without bringing the complaints and requests before the Complaint Screening Committee or full FSC for consideration. The General Counsel shall provide the total number of complaints and inquiries referred to the statewide DNA Mixture Review Team to the FSC at each quarterly meeting during which such referrals are made.

(n) The General Counsel may dismiss complaints not related to an examination or test on physical evidence, because such complaints fall outside the Commission's jurisdiction as they are not "forensic analysis" complaints as defined by Article 38.35, Code of Criminal Procedure.

(o) Any Commission member has a right to reopen cases falling under paragraphs (l), (m) or (n) above. Commission staff shall maintain a list of the complaints dismissed under paragraphs (l), (m) and (n).

4.0 Investigation Panels

(a) After the full FSC votes to conduct an investigation, the Chair shall nominate at least three members of the FSC to an Investigation Panel ("Panel") subject to the approval of the full FSC, and the Panel shall elect one of the members as chair of the Panel.

(b) After a complaint or self-disclosure is designated for investigation and assigned a Panel by the Commission, the complainant, actor involved in the forensic analysis and the laboratory, facility or entity may provide any information to the Commission that may assist the Commission in its investigation, including information that will assist the Commission in making a finding regarding professional negligence and/or misconduct.

(c) A Panel shall coordinate any information gathering for complaints and self-disclosures designated for investigation by the Commission. The Panel shall specify the focus of the investigation, communicate with the entities or individuals involved in the investigation, and collect any appropriate records. The Panel may initiate contact with any governmental agency, individual or entity that may have an interest in or relevant information regarding an investigation. The Panel may:

- (1) collect and review documents and data as necessary;
- (2) conduct interviews with individuals as needed;
- (3) issue notification of results or refer the case to a governmental or other relevant agency or accrediting body, pursuant to a written communication, memorandum of understanding or other agreement between the agencies;
- (4) contract with a subject matter expert if needed;¹⁵
- (5) make recommendations to the Commission regarding the presence or absence of professional negligence or misconduct, and other observations and recommendations as permitted by law; or
- (6) take such other action as appropriate and necessary for the Commission to fulfill its investigative responsibilities.

¹⁵ TEX. CODE CRIM. PROC. art. 38.01 § 4(c).

(d) If the FSC votes to investigate a complaint or self-disclosure, the Panel shall coordinate the completion of the investigation and draft a written report pursuant to Section 1.1(b), including a recommendation for final disposition to the full FSC. The Panel may delegate the initial draft of the report to Commission staff. An investigative report or recommendation is not final and does not represent the conclusions of the FSC until a final report is adopted and issued by the full FSC. Following consideration of the recommendation for final disposition from the Panel, the Commission shall issue a report using the criteria set forth in its enabling statute.

For investigations involving accredited crime laboratories and accredited forensic disciplines only, the FSC may:

- (1) find there is insufficient information to conclude that professional negligence or professional misconduct occurred in the forensic analysis;
- (2) find there is sufficient information to conclude that professional negligence or professional misconduct occurred in the forensic analysis;
- (3) require retrospective re-examination of evidence as appropriate;
- (4) require corrective action and follow-up as appropriate.

For all Commission investigations, regardless of whether they involve accredited crime laboratories or accredited forensic disciplines, the Commission's report may:

- (1) make observations regarding the integrity and reliability of the forensic analysis conducted;
- (2) identify applicable best practices; and
- (3) make other relevant recommendations.

(e) Any finding by the Commission is not a comment upon the guilt or innocence of any individual and is not necessarily a basis for relief in litigation or in any other forum. Reports of the Commission are not admissible in a civil or criminal action.¹⁶

(f) The FSC shall make the final report available to the public¹⁷ on the FSC website and provide a copy, as applicable, to the:

- (1) prosecutor, judge, defendant and defense attorney involved in the underlying criminal case, if any;
- (2) Board of Pardons and Paroles;
- (3) Director of the Department of Public Safety;
- (4) Governor;
- (5) Lieutenant Governor;
- (6) Speaker of the House of Representatives;
- (7) Complainant; and
- (8) Actor(s) and accredited laboratory, facility or entity involved in any part of the forensic analysis.¹⁸

¹⁶ TEX. CODE CRIM. PROC. art. 38.01 § 4(g)..

¹⁷ TEX. CODE CRIM. PROC. art. 38.01 § 4(e).

¹⁸ TEX. CODE CRIM. PROC. art. 38.01 § 7.

(g) FSC Investigation Panels may meet by telephone for information-gathering purposes only. All deliberative discussions by Panels shall be held in open, public meetings in accordance with the Texas Open Meetings Act or other applicable law.

5.0 Forensic Analyst Licensing

(a) The Commission by rule may establish classifications of forensic analyst licenses if the Commission determines that it is necessary to ensure the availability of properly trained and qualified forensic analysts to perform activities regulated by the Commission.¹⁹

(b) Effective January 1, 2019, a person may not act or offer to act as a forensic analyst unless the person holds a forensic analyst license.²⁰

(c) The Commission by rule may establish voluntary licensing programs for forensic disciplines that are not subject to accreditation by the Commission.²¹

(d) The Commission by rule shall:

(1) establish the qualifications for a license that include:

(A) successful completion of the education requirements established by the Commission;

(B) specific coursework and experience, including instruction in courtroom testimony and ethics in a crime laboratory;

(C) successful completion of an examination required or recognized by the Commission; and

(D) successful completion of proficiency testing to the extent required from crime laboratory accreditation;

(2) set fees for the issuance and renewal of a license; and

(3) establish the term of a forensic analyst license.²²

(e) The Commission may by rule recognize a certification issued by a national organization in an accredited field of forensic science as satisfying the requirements established under 5.0 (a) to the extent the Commission determines the content required to receive the certification is substantially equivalent to the content of the requirements under 5.0 (a).²³

(f) The Commission shall issue a license to an applicant who:

(1) submits an application on a form prescribed by the Commission;

(2) meets the qualifications established by Commission rule; and

(3) pays the required fee.²⁴

¹⁹ TEX. CODE CRIM. PROC. art. 38.01 § 4-a(b).

²⁰ TEX. CODE CRIM. PROC. art. 38.01 § 4-a(b).

²¹ TEX. CODE CRIM. PROC. art. 38.01 § 4-a(c).

²² TEX. CODE CRIM. PROC. art. 38.01 § 4-a(d).

²³ TEX. CODE CRIM. PROC. art. 38.01 § 4-a(e).

²⁴ TEX. CODE CRIM. PROC. art. 38.01 § 4-a(f).

5.1 Advisory Committee

(a) The Commission shall establish an advisory committee to advise the Commission and make recommendations on matters related to the licensing of forensic analysts under 5.0.²⁵

(b) The advisory committee consists of nine members as follows:

(1) one prosecuting attorney recommended by the Texas District and County Attorneys Association;

(2) one defense attorney recommended by the Texas Criminal Defense Lawyers Association; and

(3) seven members who are forensic scientists, crime laboratory directors, or crime laboratory quality managers, selected by the Commission from a list of 20 names submitted by the Texas Association of Crime Laboratory Directors.²⁶

(c) The Commission shall ensure that appointments under 5.1(b) include representation from municipal, county, state and private crime laboratories that are accredited by the Commission.²⁷

(d) The advisory committee members serve staggered two-year terms, with the terms of four or five members, as appropriate, expiring on August 31 of each year. An advisory committee member may not serve more than two consecutive terms. A vacancy on the advisory committee is filled by appointing a member in the same manner as the original appointment to serve for the unexpired portion of the term.²⁸

(e) The advisory committee shall elect a presiding officer from among its members to serve a one-year term. A member may serve more than one term as presiding officer.²⁹

(f) The advisory committee shall meet annually and at the call of the presiding officer or the Commission.³⁰

(g) An advisory committee member is not entitled to compensation. A member is entitled to reimbursement for actual and necessary expenses incurred in performing duties as a member of the advisory committee subject to the General Appropriations Act.³¹

(h) All advisory committee meetings shall be held open to the public in compliance with the Open Meetings Act.³²

5.2 Disciplinary Action

(a) On a determination by the Commission that a license holder has committed professional misconduct or violated a rule or order of the Commission, the Commission may:

(1) revoke or suspend the person's license;

²⁵ TEX. CODE CRIM. PROC. art. 38.01 § 4-b(a).

²⁶ TEX. CODE CRIM. PROC. art. 38.01 § 4-b(b).

²⁷ TEX. CODE CRIM. PROC. art. 38.01 § 4-b(c).

²⁸ TEX. CODE CRIM. PROC. art. 38.01 § 4-b(d).

²⁹ TEX. CODE CRIM. PROC. art. 38.01 § 4-b(e).

³⁰ TEX. CODE CRIM. PROC. art. 38.01 § 4-b(f).

³¹ TEX. CODE CRIM. PROC. art. 38.01 § 4-b(g).

³² TEX. CODE CRIM. PROC. art. 38.01 § 4-b(h).

- (2) refuse to renew the person's license; or
- (3) reprimand the license holder.³³

(b) The Commission may place on probation a person whose license is suspended. If a license suspension is probated, the Commission may require the license holder to:

- (1) report regularly to the Commission on matters that are the basis of the probation; or
- (2) continue or review continuing professional education until the license holder attains a degree of skill satisfactory to the Commission in those areas that are the basis of the probation.³⁴

(c) All disciplinary proceedings of the Commission are governed by Chapter 2001 of the Texas Government Code. A hearing under Section 5.0 shall be conducted by an administrative law judge of the State Office of Administrative Hearings.³⁵

6.0 Crime Laboratory Accreditation Process

(a) The Commission by rule:

- (1) shall establish an accreditation process for crime laboratories and other entities conducting forensic analyses of physical evidence for use in criminal proceedings; and
- (2) may modify or remove a crime laboratory exemption if the Commission determines that the underlying reason for the exemption no longer applies.³⁶

(b) As part of the accreditation process established and implemented under this Section, the Commission may:

- (1) establish minimum standards that relate to the timely production of forensic analysis to the agency requesting the analysis and that are consistent with the Commissions enabling statute and applicable laws.
- (2) validate or approve specific forensic methods or methodologies; and
- (3) establish procedures, policies, and practices to improve the quality of forensic analyses conducted in Texas.³⁷

(c) The Commission may require that a laboratory, facility or entity required to be accredited by the Commission pay any costs incurred to ensure compliance with the accreditation process.³⁸

(d) A laboratory, facility or entity that must be accredited by the Commission shall, as part of the accreditation process, agree to consent to any request for cooperation by the Commission that is made as part of the exercise of the Commission's duties under this Section.³⁹

³³ TEX. CODE CRIM. PROC. art. 38.01 § 4-c(a).

³⁴ TEX. CODE CRIM. PROC. art. 38.01 § 4-c(b).

³⁵ TEX. CODE CRIM. PROC. art. 38.01 § 4-c(c).

³⁶ TEX. CODE CRIM. PROC. art. 38.01 § 4-d(b).

³⁷ TEX. CODE CRIM. PROC. art. 38.01 § 4-d(b-1).

³⁸ TEX. CODE CRIM. PROC. art. 38.01 § 4-d(b-2).

³⁹ TEX. CODE CRIM. PROC. art. 38.01 § 4-d(b-3).

(e) The Commission may by rule exempt from the accreditation process a crime laboratory conducting a forensic analysis or type of analysis, examination, or test if the Commission determines that:

(1) independent accreditation is unavailable or inappropriate for the laboratory or the type of analysis, examination, or test performed by the laboratory;

(2) the type of analysis, examination, or test performed by the laboratory is admissible under a well-established rule of evidence or other statutory other than Article 38.35;

(3) the type of analysis, examination, or test performed by the laboratory is routinely conducted outside of a crime laboratory by a person other than an employee of the crime laboratory; or

(4) the laboratory:

(a) is located outside Texas or, if located in Texas, is operated by a governmental entity other than the state or a political subdivision of the state; and

(b) was accredited at the time of the analysis under an accreditation process with standards that meet or exceed the relevant standards of the process established under Section 6.0 (b).⁴⁰

(f) The Commission may at any reasonable time enter and inspect the premises or audit the records, reports, procedures, or other quality assurance matters of a crime laboratory that is accredited or seeking accreditation.⁴¹

(g) The Commission may collect costs incurred for accrediting, inspecting, or auditing a crime laboratory.⁴²

(h) If the Commission provides a copy of an audit or other report made under this Section, the Commission may charge \$6 for the copy, in addition to any other cost permitted under Chapter 552, Government Code, or a rule adopted under that chapter.⁴³

(i) Rules promulgated under the Commission's accreditation authority described in this subsection are published in the Texas Administrative Code, Chapter 651.⁴⁴

(j) To maintain accreditation by the Commission, Laboratories shall provide the Commission with a copy of correspondence and each report or communication between the laboratory and the recognized accrediting body. The laboratory shall submit the copy to the Commission no later than 30 days after the date the laboratory receives or transmits the correspondence, report, or communication. *See Policies and Procedures Appendix A for guidance related to reporting requirements.*⁴⁵

⁴⁰ TEX. CODE CRIM. PROC. art. 38.01 § 4-d(c).

⁴¹ TEX. CODE CRIM. PROC. art. 38.01 § 4-d(d).

⁴² TEX. CODE CRIM. PROC. art. 38.01 § 4-d(e).

⁴³ TEX. CODE CRIM. PROC. art. 38.01 § 4-d(f).

⁴⁴ Tex. Admin. Code, 37 ch. 651.

⁴⁵ Tex. Admin. Code 37 ch. 651.8 (d)(2).

7.0 Rio Grande Identification Project

The Commission shall work with stakeholders to establish a method for collecting DNA and other forensic evidence related to unidentified bodies located less than 120 miles from the Rio Grande River.⁴⁶

8.0 Forensic Development Committee

The Forensic Development Committee shall develop, subject to the approval of the full FSC, plans to strengthen the use of scientifically reliable forensic science in criminal courts in Texas. Such plans may include collection and dissemination of funding opportunities for the advancement of forensic science, support for training and the development of professional standards and the collection of information that supports programs for strengthening forensic science.

9.0 Legislative Committee

The Legislative Committee shall study the ongoing work of the FSC and be prepared to monitor legislation and testify when requested on the application of statutes within the purview of the FSC. The committee shall also review and recommend a legislative appropriations request to the full FSC and monitor the appropriations process as it affects the FSC.

10.0 Records

(a) All investigations shall be assigned a unique number to be used for subsequent documentation in that matter. Mere receipt of a complaint or disclosure does not imply any opinion by the FSC as to the merits of the allegations in the complaint or issues raised in the disclosure.

(b) FSC records shall be centralized and organized by staff for simplicity of access and ease of response to open records requests. To the extent feasible, records should be digitized and stored electronically.

11.0 Open Records Requests/Rule 12 - Rules of Judicial Administration

(a) The Commission shall comply with Rule 12 of the Rules of Judicial Administration in providing the public access to records held by the Commission.⁴⁷

(b) Rule 12 applies to records in practically any medium and includes the following, a document, paper, letter, map, book, tape, photograph, film, recording, or other material, regardless of electronic or physical form, characteristics, or means of transmission.

Information may be considered public and subject to disclosure under Rule 12 even when it is sent from a personal email account or personal mobile device. *If the information concerns Commission business, it is public information under Rule 12 regardless of where it is stored.*

(c) The Commission's designated Records Custodian is:

M. Kathryn Adams
1700 North Congress Ave., Suite 445
Austin, Texas 78701
(512) 936-0770

⁴⁶ TEX. CODE CRIM. PROC. art. 38.01 § 12.

⁴⁷ See Appendix B, Rule 12 of the Rules of Judicial Administration.

(d) The FSC accepts written records requests via facsimile to (512) 936-7986, by email to info@fsc.texas.gov, or by regular mail to our office at 1700 North Congress Avenue, Suite 445, Austin, TX 78701.

(e) If the cost to provide public information exceeds \$40, the FSC may charge for personnel time, overhead, and postage. The FSC tries to waive and minimize fees where doing so is in the public interest and where the cost of processing collection of a charge will exceed the amount of the charge. However, a decision to waive a fee for one request does not necessarily mean the fee will be waived for a future request. A person who believes that a charge for a copy of a record is excessive may appeal the overcharge in the manner prescribed by Rule 12.9 for the appeal of the denial of access to a judicial record.⁴⁸

(f) Information filed as part of an allegation of professional misconduct or professional negligence or that is obtained during an investigation of an allegation of professional negligence or professional misconduct is not subject to release until the conclusion of an investigation by the FSC.⁴⁹

12.0 Budget

The FSC shall adopt an operating budget each fiscal year. The Chair shall approve expenditures recommended by the General Counsel in between meetings that are not specified within the budget. A revised budget to reflect such expenditures shall be included for review in the next quarterly meeting's materials.

13.0 Administrative Attachment to Office of Court Administration

(a) Commission staff are employees of the Office of Court Administration ("OCA"), but operate under the supervision of the Chair of the FSC. Staff includes a General Counsel, Commission Coordinator, Associate General Counsel, Senior Scientific Advisor and any other such staff necessary to complete the duties of the FSC. The duties of staff shall be summarized in separate job descriptions.

(b) The OCA may contract for goods and services on behalf of FSC. The Commission General Counsel, Associate General Counsel and the FSC Chair jointly monitor contract activities that are engaged for FSC.

(c) The Office of Court Administration shall provide administrative support to the Commission as necessary to carry out the purposes of this article.⁵⁰

(d) Only the Commission may exercise the duties of the Commission. The Office of Court Administration has no authority or responsibility with respect to the duties of the Commission.⁵¹

⁴⁸ See Appendix B, Rule 12 of the Rules of Judicial Administration.

⁴⁹ TEX. CODE CRIM. PROC. art. 38.01 § 10.

⁵⁰ TEX. CODE CRIM. PROC. art. 38.01 § 9.

⁵¹ TEX. CODE CRIM. PROC. art. 38.01 § 9.

14.0 Additional Assistance

(a) As needed, the FSC shall seek the assistance of the Texas Legislative Council, the Legislative Budget Board, and the University of Texas at Austin.⁵²

(b) As needed, the FSC may delegate the duties related to developing and implementing the reporting system described in 1.1(a)(1) to any person the FSC determines to be qualified to assume those duties.⁵³

(c) The FSC shall develop a memorandum of understanding or other appropriate agreement with each assisting entity or person.

15.0 Public Comment

(a) The FSC shall include “public comment” as a topic on the agenda for each regularly scheduled meeting of the full FSC. The FSC reserves the right to eliminate, reduce or postpone the public comment period if deemed necessary due to time constraints or other exigent circumstances.

(b) During the public comment period, any member of the public, subject to the restrictions of this policy, may address the Commission regarding any matter related to the business of the Commission. Persons who attend or participate in the Commission meeting are expected to act in a manner that is respectful of the conduct of public business and conducive to orderly and polite public discourse. Public comment will typically occur at the end of the FSC meeting.

(c) Members of the public shall complete a public participation form before the FSC meeting and deliver the form to the Commission Coordinator.

(d) Each speaker generally shall be provided three minutes to present public comment. The Commission reserves the right to expand or reduce the time allotted to each speaker and/or to set an overall time limit for the public comment period, depending upon the particular circumstances and requirements of each meeting.

(e) Pursuant to Chapter 551 of the Texas Government Code, relating to open meetings, the Commission may respond to an inquiry regarding a subject not listed on the agenda only with:

- (1) a statement of specific factual information in response to the inquiry; or
- (2) a recitation of existing policy in response to the inquiry.

Any deliberation or decision about a subject not listed on the agenda must be limited to a proposal to place the subject on the agenda for a subsequent meeting.

(f) Members of the public are encouraged to submit written comments to the FSC at any time.

⁵² TEX. CODE CRIM. PROC. art. 38.01 § 6.

⁵³ TEX. CODE CRIM. PROC. art. 38.01 § 4(c).

16.0 Communications Policy

(a) Legislative Hearings

- (1) An employee who attends or testifies at any public hearing shall obtain advance authorization from the FSC Chair and notify the Legislative Committee.
- (2) Commission members shall notify the Commission Coordinator regarding any hearing at which they intend to testify in their capacity as a member of the FSC.

(b) Media

- (1) To the extent feasible, Commission members shall inform the General Counsel of all FSC-related media inquiries for interviews, so that the inquiries may be properly organized, recorded and assigned for reply. Commission members may inform the media of this policy and direct media inquiries to the General Counsel.
- (2) Commission members and employees shall avoid discussing the details of pending investigations with the media, except upon final disposition of those investigations.

17.0 Conflicts Policy

- (1) Any member of the FSC who has a personal or private interest in a matter pending before the FSC shall publicly disclose the fact to the FSC during an open meeting. The Commissioner may not vote or otherwise participate in the matter in which he or she has an interest. The disclosure shall be entered in the minutes of the meeting.
- (2) In this section, "personal or private interest" has the same meaning as is given to it under Article III, Section 22, of the Texas Constitution governing the conduct of members of the Texas Legislature.
- (3) The scope of the term "public or private interest" has not been clearly defined under either the constitutional provision or the Government Code section. Therefore, the question of whether a member has a personal or private interest in a matter pending before the FSC is a fact question to be analyzed on a case-by-case basis. Any questions should be brought to the attention of the FSC General Counsel, who may in turn consult the Texas Ethics Commission and/or the Texas Attorney General as appropriate.
- (4) For purposes of this section, an individual does not have a "personal or private interest" in a measure, proposal, or decision if the individual is engaged in a profession, trade, or occupation and the individual's interest is the same as all others similarly engaged in the profession, trade, or occupation.

18.0 Annual Report

The Commission will release an annual report by December 1 each year in accordance with the requirements of its enabling statute.⁵⁴

⁵⁴ TEX. CODE CRIM. PROC. art. 38.01 § 8.

19.0 Commission Office Contact Information

M. Kathryn Adams, Commission Coordinator

Texas Forensic Science Commission

1700 North Congress Avenue

Suite 445

Austin, TX 78701

Phone: 1-512-936-0770

Fax: 1-512-936-7986

E-mail: info@fsc.texas.gov

Website: www.fsc.texas.gov

APPENDIX A

TEXAS FORENSIC SCIENCE COMMISSION
GUIDELINES FOR LABORATORY SELF-DISCLOSURE

One of the Commission's statutory duties is to "require a crime laboratory that conducts forensic analyses to report professional negligence or professional misconduct to the Commission." TEX. CODE CRIM. PROC. § 38.01, Sec. 4(a)(2).

This document is designed to provide guidance to laboratories in determining whether they should disclose particular events to the Commission under the statute. Any questions regarding these guidelines should be directed to the Commission's General Counsel at (512) 936-0770.

Self-Disclosure Categories:

- Probation: If the national accrediting body responsible for accrediting your laboratory and/or the Department of Public Safety notifies you that it intends to put your laboratory on probation, you should inform the Commission as soon as possible, but no later than five (5) business days from receiving notification from the accrediting body.
- Suspension of Accreditation: If the national accrediting body responsible for accrediting your laboratory and/or the Department of Public Safety notifies you that it intends to suspend your laboratory's accreditation for any reason, you should inform the Commission as soon as possible, but no later than five (5) business days from receiving notification from the accrediting body.
- Significant Irregularity in the Laboratory: Laboratories shall disclose any irregularity that may rise to the level of professional negligence or misconduct using the disclosure form on the Commission's website. **The disclosure should be submitted to the Commission as soon as possible, but no later than thirty (30) days after the irregularity is discovered.** If the laboratory needs a longer period to submit its disclosure, it should contact the Commission's General Counsel with an explanation and a request for additional time.

Please note that the outcome of any particular criminal case should not be a consideration in your decision regarding whether to disclose an issue to the Commission. You should disclose any significant laboratory irregularity regardless of the criminal case outcome, and regardless of whether the quality controls in the laboratory caught the issue of concern before a final report was issued to the customer. When using the term "significant irregularity," we refer to facts that *if true*, would indicate the existence of negligence or misconduct such that the integrity of the forensic examination, the individual forensic examiner, or the laboratory as a whole would be called into question.

If your self-disclosure involves a pending criminal case, or you believe that anyone involved in the disclosure may be the subject of criminal investigation, please alert the Commission when submitting your disclosure, as certain law enforcement exceptions to the Public Information Act may apply to the information submitted.

APPENDIX B

RULE 12

RULES OF JUDICIAL ADMINISTRATION

Rule 12. Public Access to Judicial Records

12.1 Policy. The purpose of this rule is to provide public access to information in the judiciary consistent with the mandates of the Texas Constitution that the public interests are best served by open courts and by an independent judiciary. The rule should be liberally construed to achieve its purpose.

12.2 Definitions. In this rule:

(a) *Judge* means a regularly appointed or elected judge or justice.

(b) *Judicial agency* means an office, board, commission, or other similar entity that is in the Judicial Department and that serves an administrative function for a court. A task force or committee created by a court or judge is a "judicial agency".

(c) *Judicial officer* means a judge, former or retired visiting judge, referee, commissioner, special master, court-appointed arbitrator, or other person exercising adjudicatory powers in the judiciary. A mediator or other provider of non-binding dispute resolution services is not a "judicial officer".

(d) *Judicial record* means a record made or maintained by or for a court or judicial agency in its regular course of business but not pertaining to its adjudicative function, regardless of whether that function relates to a specific case. A record of any nature created, produced, or filed in connection with any matter that is or has been before a court is not a judicial record. A record is a document, paper, letter, map, book, tape, photograph, film, recording, or other material, regardless of electronic or physical form, characteristics, or means of transmission.

(e) *Records custodian* means the person with custody of a judicial record determined as follows:

(1) The judicial records of a court with only one judge, such as any trial court, are in the custody of that judge. Judicial records pertaining to the joint administration of a number of those courts, such as the district courts in a particular county or region, are in the custody of the judge who presides over the joint administration, such as the local or regional administrative judge.

(2) The judicial records of a court with more than one judge, such as any appellate court, are in the custody of the chief justice or presiding judge, who must act under this rule in accordance with the vote of a majority of the judges of the court. But the judicial records relating specifically to the service of one such judge or that judge's own staff are in the custody of that judge.

(3) The judicial records of a judicial officer not covered by subparagraphs (1) and (2) are in the custody of that officer.

(4) The judicial records of a judicial agency are in the custody of its presiding officer, who must act under this rule in accordance with agency policy or the vote of a majority of the members of the agency.

12.3 Applicability. This rule does not apply to:

(a) records or information to which access is controlled by:

(1) a state or federal court rule, including:

(A) a rule of civil or criminal procedure, including Rule 76a, Texas Rules of Civil Procedure;

(B) a rule of appellate procedure;

(C) a rule of evidence;

(D) a rule of administration;

(2) a state or federal court order not issued merely to thwart the purpose of this rule;

(3) the Code of Judicial Conduct;

(4) Chapter 552, Government Code, or another statute or provision of law;

(b) records or information to which Chapter 552, Government Code, is made inapplicable by statute, rule, or other provision of law, other than Section 552.003(1)(B);

(c) records or information relating to an arrest or search warrant or a supporting affidavit, access to which is controlled by:

(1) a state or federal court rule, including a rule of civil or criminal procedure, appellate procedure, or evidence; or

(2) common law, court order, judicial decision, or another provision of law

(d) elected officials other than judges.

12.4 Access to Judicial Records.

(a) **Generally.** Judicial records other than those covered by Rules 12.3 and 12.5 are open to the general public for inspection and copying during regular business hours. But this rule does not require a court, judicial agency, or records custodian to:

(1) create a record, other than to print information stored in a computer;

(2) retain a judicial record for a specific period of time;

(3) allow the inspection of or provide a copy of information in a book or publication commercially available to the public; or

(4) respond to or comply with a request for a judicial record from or on behalf of an individual who is imprisoned or confined in a correctional facility as defined in Section 1.07(a), Penal Code, or in any other such facility in any state, federal, or foreign jurisdiction.

(b) *Voluntary Disclosure.* A records custodian may voluntarily make part or all of the information in a judicial record available to the public, subject to Rules 12.2(e)(2) and 12.2(e)(4), unless the disclosure is expressly prohibited by law or exempt under this rule, or the information is confidential under law. Information voluntarily disclosed must be made available to any person who requests it.

12.5 Exemptions from Disclosure. The following records are exempt from disclosure under this rule:

(a) *Judicial Work Product and Drafts.* Any record that relates to a judicial officer's adjudicative decision-making process prepared by that judicial officer, by another judicial officer, or by court staff, an intern, or any other person acting on behalf of or at the direction of the judicial officer.

(b) *Security Plans.* Any record, including a security plan or code, the release of which would jeopardize the security of an individual against physical injury or jeopardize information or property against theft, tampering, improper use, illegal disclosure, trespass, unauthorized access, or physical injury.

(c) *Personnel Information.* Any personnel record that, if disclosed, would constitute a clearly unwarranted invasion of personal privacy.

(d) *Home Address and Family Information.* Any record reflecting any person's home address, home or personal telephone number, social security number, or family members.

(e) *Applicants for Employment or Volunteer Services.* Any records relating to an applicant for employment or volunteer services.

(f) *Internal Deliberations on Court or Judicial Administration Matters.* Any record relating to internal deliberations of a court or judicial agency, or among judicial officers or members of a judicial agency, on matters of court or judicial administration.

(g) *Court Law Library Information.* Any record in a law library that links a patron's name with the materials requested or borrowed by that patron.

(h) *Judicial Calendar Information.* Any record that reflects a judicial officer's appointments or engagements that are in the future or that constitute an invasion of personal privacy.

(i) *Information Confidential Under Other Law.* Any record that is confidential or exempt from disclosure under a state or federal constitutional provision, statute or common law, including information that relates to:

(1) a complaint alleging misconduct against a judicial officer, if the complaint is exempt from disclosure under Chapter 33, Government Code, or other law;

(2) a complaint alleging misconduct against a person who is licensed or regulated by the courts, if the information is confidential under applicable law; or

(3) a trade secret or commercial or financial information made privileged or confidential by statute or judicial decision.

(j) *Litigation or Settlement Negotiations.* Any judicial record relating to civil or criminal litigation or settlement negotiations:

(1) in which a court or judicial agency is or may be a party; or

(2) in which a judicial officer or member of a judicial agency is or may be a party as a consequence of the person's office or employment.

(k) *Investigations of Character or Conduct.* Any record relating to an investigation of any person's character or conduct, unless:

(1) the record is requested by the person being investigated; and

(2) release of the record, in the judgment of the records custodian, would not impair the investigation.

(l) *Examinations.* Any record relating to an examination administered to any person, unless requested by the person after the examination is concluded.

12.6 Procedures for Obtaining Access to Judicial Records.

(a) *Request.* A request to inspect or copy a judicial record must be in writing and must include sufficient information to reasonably identify the record requested. The request must be sent to the records custodian and not to a court clerk or other agent for the records custodian. A requestor need not have detailed knowledge of the records custodian's filing system or procedures in order to obtain the information.

(b) *Time for Inspection and Delivery of Copies.* As soon as practicable--and not more than 14 days--after actual receipt of a request to inspect or copy a judicial record, if the record is available, the records custodian must either:

(1) allow the requestor to inspect the record and provide a copy if one is requested; or

(2) send written notice to the requestor stating that the record cannot within the prescribed period be produced or a copy provided, as applicable, and setting a reasonable date and time when the document will be produced or a copy provided, as applicable.

(c) *Place for Inspection.* A records custodian must produce a requested judicial record at a convenient, public area.

(d) *Part of Record Subject to Disclosure.* If part of a requested record is subject to disclosure under this rule and part is not, the records custodian must redact the portion of the record that is

not subject to disclosure, permit the remainder of the record to be inspected, and provide a copy if requested.

(e) Copying; Mailing. The records custodian may deliver the record to a court clerk for copying. The records custodian may mail the copy to a requestor who has prepaid the postage.

(f) Recipient of Request not Custodian of Record. A judicial officer or a presiding officer of a judicial agency who receives a request for a judicial record not in his or her custody as defined by this rule must promptly attempt to ascertain who the custodian of the record is. If the recipient of the request can ascertain who the custodian of the requested record is, the recipient must promptly refer the request to that person and notify the requestor in writing of the referral. The time for response prescribed in Rule 12.6(b) does not begin to run until the referral is actually received by the records custodian. If the recipient cannot ascertain who the custodian of the requested record is, the recipient must promptly notify the requestor in writing that the recipient is not the custodian of the record and cannot ascertain who the custodian of the record is.

(g) Inquiry to Requestor. A person requesting a judicial record may not be asked to disclose the purpose of the request as a condition of obtaining the judicial record. But a records custodian may make inquiry to establish the proper identification of the requestor or to clarify the nature or scope of a request.

(h) Uniform Treatment of Requests. A records custodian must treat all requests for information uniformly without regard to the position or occupation of the requestor or the person on whose behalf a request is made, including whether the requestor or such person is a member of the media.

12.7 Costs for Copies of Judicial Records; Appeal of Assessment.

(a) Cost. The cost for a copy of a judicial record is either:

- (1) the cost prescribed by statute, or
- (2) if no statute prescribes the cost, the actual cost, as defined in Section 111.62, Title 1, Texas Administrative Code, not to exceed 125 percent of the amount prescribed by the General Services Commission for providing public information under Title 1, Texas Administrative Code, Sections 111.63, 111.69, and 111.70.

(b) Waiver or Reduction of Cost Assessment by Records Custodian. A records custodian may reduce or waive the charge for a copy of a judicial record if:

- (1) doing so is in the public interest because providing the copy of the record primarily benefits the general public, or
- (2) the cost of processing collection of a charge will exceed the amount of the charge.

(c) Appeal of Cost Assessment. A person who believes that a charge for a copy of a judicial record is excessive may appeal the overcharge in the manner prescribed by Rule 12.9 for the appeal of the denial of access to a judicial record.

(d) *Records Custodian not Personally Responsible for Cost.* A records custodian is not required to incur personal expense in furnishing a copy of a judicial record.

12.8 Denial of Access to a Judicial Record.

(a) *When Request May be Denied.* A records custodian may deny a request for a judicial record under this rule only if the records custodian:

(1) reasonably determines that the requested judicial record is exempt from required disclosure under this rule; or

(2) makes specific, non-conclusory findings that compliance with the request would substantially and unreasonably impede the routine operation of the court or judicial agency.

(b) *Time to Deny.* A records custodian who denies access to a judicial record must notify the person requesting the record of the denial within a reasonable time--not to exceed 14 days--after receipt of the request, or before the deadline for responding to the request extended under Rule 12.6 (b)(2).

(c) *Contents of Notice of Denial.* A notice of denial must be in writing and must:

(1) state the reason for the denial;

(2) inform the person of the right of appeal provided by Rule 12.9; and

(3) include the name and address of the Administrative Director of the Office of Court Administration.

12.9 Relief from Denial of Access to Judicial Records.

(a) *Appeal.* A person who is denied access to a judicial record may appeal the denial by filing a petition for review with the Administrative Director of the Office of Court Administration.

(b) *Contents of Petition for Review.* The petition for review:

(1) must include a copy of the request to the record custodian and the records custodian's notice of denial;

(2) may include any supporting facts, arguments, and authorities that the petitioner believes to be relevant; and

(3) may contain a request for expedited review, the grounds for which must be stated.

(c) *Time for Filing.* The petition must be filed not later than 30 days after the date that the petitioner receives notice of a denial of access to the judicial record.

(d) *Notification of Records Custodian and Presiding Judges.* Upon receipt of the petition for review, the Administrative Director must promptly notify the records custodian who denied

access to the judicial record and the presiding judge of each administrative judicial region of the filing of the petition.

(e) *Response.* A records custodian who denies access to a judicial record and against whom relief is sought under this section may--within 14 days of receipt of notice from the Administrative Director--submit a written response to the petition for review and include supporting facts and authorities in the response. The records custodian must mail a copy of the response to the petitioner. The records custodian may also submit for in camera inspection any record, or a sample of records, to which access has been denied.

(f) *Formation of Special Committee.* Upon receiving notice under Rule 12.9(d), the presiding judges must refer the petition to a special committee of not less than five of the presiding judges for review. The presiding judges must notify the Administrative Director, the petitioner, and the records custodian of the names of the judges selected to serve on the committee.

(g) *Procedure for Review.* The special committee must review the petition and the records custodian's response and determine whether the requested judicial record should be made available under this rule to the petitioner. The special committee may request the records custodian to submit for in camera inspection a record, or a sample of records, to which access has been denied. The records custodian may respond to the request in whole or in part but it not required to do so.

(h) *Considerations.* When determining whether the requested judicial record should be made available under this rule to petition, the special committee must consider:

- (1) the text and policy of this Rule;
- (2) any supporting and controverting facts, arguments, and authorities in the petition and the response; and
- (3) prior applications of this Rule by other special committees or by courts.

(i) *Expedited Review.* On request of the petitioner, and for good cause shown, the special committee may schedule an expedited review of the petition.

(j) *Decision.* The special committee's determination must be supported by a written decision that must:

- (1) issue within 60 days of the date that the Administrative Director received the petition for review;
- (2) either grant the petition in whole or in part or sustain the denial of access to the requested judicial record;
- (3) state the reasons for the decision, including appropriate citations to this rule; and
- (4) identify the record or portions of the record to which access is ordered or denied, but only if the description does not disclose confidential information.

(k) Notice of Decision. The special committee must send the decision to the Administrative Director. On receipt of the decision from the special committee, the Administrative Director must:

(1) immediately notify the petitioner and the records custodian of the decision and include a copy of the decision with the notice; and

(2) maintain a copy of the special committee's decision in the Administrative Director's office for public inspection.

(l) Publication of Decisions. The Administrative Director must publish periodically to the judiciary and the general public the special committees' decisions.

(m) Final Decision. A decision of a special committee under this rule is not appealable but is subject to review by mandamus.

(n) Appeal to Special Committee Not Exclusive Remedy. The right of review provided under this subdivision is not exclusive and does not preclude relief by mandamus.

12.10 Sanctions. A records custodian who fails to comply with this rule, knowing that the failure to comply is in violation of the rule, is subject to sanctions under the Code of Judicial Conduct.

Comments

1. Although the definition of "judicial agency" in Rule 12.2(b) is comprehensive, applicability of the rule is restricted by Rule 12.3. The rule does not apply to judicial agencies whose records are expressly made subject to disclosure by statute, rule, or law. An example is the State Bar ("an administrative agency of the judicial department", Tex. Gov't Code § 81.011(a)), which is subject to the Public Information Act. Tex. Gov't Code § 81.033. Thus, no judicial agency must comply with both the Act and this rule; at most one can apply. Nor does the rule apply to judicial agencies expressly excepted from the Act by statute (other than by the general judiciary exception in section 552.003(b) of the Act), rule, or law. Examples are the Board of Legal Specialization, Tex. Gov't Code § 81.033, and the Board of Disciplinary Appeals, Tex. R. Disciplinary App. 7.12. Because these boards are expressly excepted from the Act, their records are not subject to disclosure under this rule, even though no law affirmatively makes their records confidential. The Board of Law Examiners is partly subject to the Act and partly exempt, Tex. Gov't Code § 82.003, and therefore this rule is inapplicable to it. An example of a judicial agency subject to the rule is the Supreme Court Advisory Committee, which is neither subject to nor expressly excepted from the Act, and whose records are not made confidential by any law.

2. As stated in Rule 12.4, this rule does not require the creation or retention of records, but neither does it permit the destruction of records that are required to be maintained by statute or other law, such as Tex. Gov't Code §§ 441.158-.167, .180-.203; Tex. Local Gov't Code ch. 203; and 13 Tex. Admin. Code § 7.122.

3. Rule 12.8 allows a records custodian to deny a record request that would substantially and unreasonably impede the routine operation of the court or judicial agency. As an illustration, and not by way of limitation, a request for "all judicial records" that is submitted every day or even every few days by the same person or persons acting in concert could substantially and

unreasonably impede the operations of a court or judicial agency that lacked the staff to respond to such repeated requests.