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August 1, 2022

VIA EMAIL ONLY

The Honorable Chris Wooten, Chair
Law Enforcement and Criminal Justice Subcommittee
Legislative Oversight Committee
Post Office Box 11867
Columbia, South Carolina 29211

Dear Representative Wooten,

Thank you for your letter dated July 11, 2022, requesting responses to questions related to the oversight study of the Attorney General's Office.

Our responses are provided on the attached pages.

Please let me know if we may provide further information.

Sincerely,

Grant Gillespie

Attachments

Questions to State Fiscal Accountability Authority

General

1. To the extent known, please explain which entity is responsible for S.C. Code of Regulations [Chapter 19](#).

SFAA Response:

The response to this question appears on the attached review of the regulations in Chapter 19.

2. What recommendations does the agency have for updating S.C. Code of Regulations Chapter 19 to ensure it accurately reflects the appropriate entities?

SFAA Response:

The response to this question appears on the attached review of the regulations in Chapter 19.

Agency Head Salary Review

3. Does an agency head's review include an analysis of whether the agency head ensures all agency employees receive a performance evaluation at least annually, and not have a "default evaluation" in the Employee Performance Management System? Why or why not?

SFAA Response:

The Attorney General does not submit a performance review to the Agency Head Salary Commission. If referring to agency heads in general, the review does not require an analysis of whether the agency head ensures all employees receive a performance evaluation annually. But it is something that certainly can be include at the agency head's discretion as has been the case in the past for SFAA.

Insurance Reserve Fund

4. What information, if any, does the Insurance Reserve Fund (IRF) track about lawsuits in which it pays for the defense of state entities and employees, for the purpose of reducing overall liability risk and improve safety and compliance across state government?

SFAA Response:

The mission of the IRF is to provide insurance for State and other governmental entities at the least possible cost.

The IRF's database was developed in conjunction with input from the actuaries to gather information to be used for insurance purposes. The IRF maintains information regarding attorney assignments and defense costs for state entities and employees, as well as for other IRF policyholders, including county, city, town and special purpose districts. Broadly speaking, the IRF tracks what appears at the initial review to be the principal reason for each lawsuit, i.e. civil rights, auto accident, medical malpractice, etc. Use of the database for statewide risk management purposes, or other purposes different from the actuarial and insurance purposes, could produce misleading results.

The IRF can review claims with an agency to assist that agency assess its loss history. The IRF does contract with the SC Hospital Association for the latter to provide educational and risk management services

to IRF insured hospitals. Also, the IRF Underwriting team conducts seminars with policyholders to help them on limited issues primarily focused on property related issues.

5. What does the IRF see as the pros and cons of collaborating with the Attorney General's Office to research and implement a more robust method for tracking all lawsuits filed against the state, including state entities and employees for the purpose of reducing overall liability risk and improve safety and compliance with the law. Note, some large corporations track the number and types of cases filed against them at all their locations throughout the country for the purposes of changing policies to reduce the number of lawsuits, as well as learn the average amount it should cost to defend certain types of cases in each area of the country to minimize litigation costs.

SFAA Response:

Collaboration may provide a better understanding by policymakers and stakeholders of the total amount of litigation involving the state. However, that information, i.e. the amount and type of litigation involving the state that is not handled by the IRF, will not provide any advantage or use to the IRF. Please see the Additional Response to Question 6, below. The IRF could provide the information regarding insured lawsuits to the Attorney General's Office or other agency keeping a statewide database, so long as that information, other than the existence of a lawsuit, does not become public information for purposes of Freedom of Information Act requests until the lawsuit is finally adjudicated. S.C. Code 1-11-140(G). Any collaboration must preserve this protection of information during the ongoing litigation. Otherwise, information could be obtained by litigants or claimants that is harmful to the defense of claims.

Risk management is often best performed at the agency level, so the agency is directly involved in assessing its risks, priorities, and allocation of funding.

6. Is there a document/report that explains who (a) receives notice of a claim/lawsuit and (b) represents an agency or employee in different situations (e.g., Attorney General v. IRF v. Agency in-house counsel v. Retained private attorney)? (See [Attorney General's Office Civil Litigation Presentation to House Legislative Oversight Committee](#), Slides 7-8)
 - a. If not, would having such a report harm the defense or representation of an agency or employee?
 - b. If it would not harm the defense or representation of an agency, is it something the IRF would be willing to work with the Attorney General's Office and others to create?

SFAA Response:

The IRF is not aware of any such document or report. The risk of that type of document is that it may create some reliance within an agency, or for an employee, to believe that a particular attorney or agency is assigned to a matter, or is handling it, when that is not the case.

Generally speaking, an agency's counsel should be initially responsible with ensuring that a claim or suit is defended, and placed in the right hands to that end. Lawsuits and claims against the state or its employees can be nuanced and complicated, and would not all fit neatly into categories. Additionally, such a document would likely be discoverable, or subject to the Freedom of Information Act. Of course, it could be documented that it is a general guideline, and no inferences or admissions should be drawn from it.

Review of Regulations in Chapter 19 of the South Carolina Code of Regulations

Generally

Responsible entity:

If a responsible entity is identified, it is offered only as a suggestion.

Recommendations for update:

Consider updates to the titles assigned to Chapter 19 and its various articles, the references in Chapter 19 to various programs and agencies, and to the statutory citations identified as the authority for promulgating the regulations.

Updates by the Code Commissioner:

Presumably, the Code Commissioner has the authority to redesignate the chapter and article titles in the Code of Regulations and to correct erroneous references to program and agency names in the regulations.

Generally, the Code Commissioner serves as the Director of the Legislative Council (§ 2-13-50) and the Legislative Council is responsible for publication of the State Register and for the codification of the Code of State Regulations. See, Sections 1-23-20 et seq. In S.C. Code § 2-13-60 (12), the Code Commissioner is also charged with general responsibility to “change or substitute names, titles, and other designations to make them conform to new laws enacted by the General Assembly or new rules, regulations, or orders having the force and effect of law.”

Specific to the South Carolina Restructuring Act of 2014 (2014 Act 121), the Act expressly provides for transition of the respective regulations of the transferred offices under the BCB, the Governor, or other agencies transferred by the Act. Regulations are to continue in effect and “are considered to be promulgated by these offices [the offices transferred] under the Department of Administration or other entities, including those newly created by the provisions of this act.” Act 121, Part III, Section 5(C). In other words, it appears that a particular program’s regulations and all related authority to amend or repeal the program’s regulations follow the program.

Act 121 directs the Code Commissioner to change and correct all references to programs affected by the Restructuring Act in both the Code and other provisions of law, to reflect the transfer of the programs to the new or different agency. See, Part III, Section 5(D)(1) and Part IX, Section 25((A)(1).

If it is the will of the House Legislative Oversight to not pursue the authority expressed above and instead promulgate new regulation making such changes, this agency will be happy to cooperate in that effort.

OED (Art 1)

1. Travel Regulations/R. 19.101 to -101.19

Responsible Entity: Comptroller General (See 2022 Act 239, Proviso 117.20(M))

Recommendations for Updating: Consult the responsible entity.

2. IRB/Pollution Control/Hospital Revenue Bonds/R. 19-102.01 to -102.05

Responsible Entity: State Fiscal Accountability Authority.

Review of Regulations in Chapter 19 of the South Carolina Code of Regulations

Recommendations for Updating: Consult with the Code Commissioner and the responsible entity about changing the applicable agency and/or program names to reflect existing structure or promulgate regulations.

3. Ceiling Allocation Private Activity Bonds/R. 19-103.01 to -103.10

Responsible Entity: State Fiscal Accountability Authority

Recommendations for Updating: Consult with the Code Commissioner and the responsible entity about changing the applicable agency and/or program names to reflect existing structure or promulgate regulations.

Note: 2022 Act 202 could precipitate changes to these regulations. At this time, not decisions have been made.

4. City, County and Regional Housing Bonds for Multifamily Housing Projects/R. 19-104.01 to -104.04

Responsible Entity: State Fiscal Accountability Authority

Recommendations for Updating: Consult with the Code Commissioner and the responsible entity about changing the applicable agency and/or program names to reflect existing structure or promulgate regulations.

Information Resource Management (Art 2)

5. 911 Local Emergency Telephone Service/R. 19-200 to -204

Responsible Entity: Revenue and Fiscal Affairs Office (See §§ 23-47-10 et seq.)

Recommendations for Updating: Consult the responsible entity.

6. SC 211 Network/R. 19-210 to -214

Responsible Entity: Unknown. (See § 1-11-770.)

Note: In 2017, we undertook a review of the regulations in Chapter 19. Regarding this program, we contacted staff at Revenue and Fiscal Affairs, Public Employee Benefits Authority, and Department of Administration. We were unable to determine which agency, if any, administers this program.

Recommendations for Updating: None

Office of General Services (Art 4)

7. Barrier Free Design/R. 19-400 to -400.3

Responsible Entity: Accessibility Committee of the Building Code Council (§ 10-5-230)

Note: Reference should be had to § 10-5-235(B), R. 8-261, and the Editor's Note to R. 8-700.

Recommendations for Updating: Consult the responsible entity.

8. State Plan for Surplus Property/R. 19-410.1 to -410.16

Review of Regulations in Chapter 19 of the South Carolina Code of Regulations

Responsible Entity: Department of Administration (See § 3-9-10)

Recommendations for Updating: Consult the responsible entity.

9. Insurance Reserve Fund/R. 19-415.1 to -415.5

Responsible Entity: State Fiscal Accountability Authority

Recommendations for Updating: Update existing regulations to conform with existing business model.

10. Consolidated Procurement Code/R. 19-445 to -446

Responsible Entity: State Fiscal Accountability Authority

Recommendations for Updating: No updates needed.

11. Leasing of Real Property/R. 19-447.1000

No recommendations.

12. Construction Permits for Navigable Waters/R. 19-450

No recommendations.

13. Building Codes Council/19.470.1 to -470.14

Responsible Entity: Building Codes Council

Recommendations for Updating: Consult with the responsible entity.

Local Government (Art 5)

14. Local Government/R. 19-501 to -503

Responsible Entity: Rural Infrastructure Authority

Note: The Local Government Division and these regulations presumably moved to Rural Infrastructure Authority pursuant to the Restructuring Act (Part VI, § 16A). See § 1-11-25 and 26.

Recommendations for Updating: Consult with the responsible entity.

HR Management (Art 7)

15. Office of Human Resources/R. 19-700 to -775.34

No recommendations.

Data Reporting Hospitals (Art 8)

16. Data Reporting Hospitals/R. 19-800 to -820

Responsible Entity: Revenue and Fiscal Affairs

Review of Regulations in Chapter 19 of the South Carolina Code of Regulations

Note: It appears that program responsibility moved to Revenue and Fiscal Affairs when the Office of Research and Statistics moved in the Restructuring Act. See § 44-6-170 et al.

Recommendations for Updating: Consult with the responsible entity.

Retirement Division (Art 9)

17. SC Retirement Systems/R. 19-900 to -997

Responsible Entity: South Carolina Public Employee Benefit Authority

Recommendations for Updating: Consult the responsible entity.

Data Reporting Ambulatory Encounters (Art 10)

18. Data Reporting for Ambulatory Encounters/R. 19-1001 to -1060

Responsible Entity: Revenue and Fiscal Affairs (See § 44-6-170.)

Recommendations for Updating: Consult the responsible entity.

19. Data Reporting for Medical Encounters and Financial Reports/R. 19-1101 to -1130

Responsible Entity: Revenue and Fiscal Affairs (See § 44-6-170.)

Recommendations for Updating: Consult the responsible entity.

Tuition Prepayment Program (Art 11)

20. Tuition Prepayment Program/R. 19-1200 to -1298

Responsible Entity: State Treasurer (See § 59-4-30)

Recommendations for Updating: Consult the responsible entity.