



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

JONATHAN F. MITCHELL
SOLICITOR GENERAL

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June 25, 2013

Elana Tyrangiel
Acting Assistant Attorney General, Office of Legal Policy
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

Dear Ms. Tyrangiel:

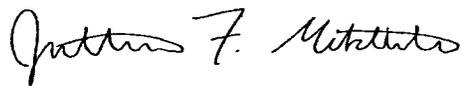
As you are aware, the State of Texas has applied for certification under 28 U.S.C. § 2265. We submitted our application on March 11, 2013—more than three months ago. In the cover letter to Attorney General Holder, the Attorney General of Texas asked to be told “the date by which Texas can expect a certification decision.” On March 29, 2013, your office responded that you could not “provide at this time a precise date certain by which a decision will be made,” but assured us that “the Department [of Justice] will begin reviewing the materials [that Texas] submitted in support of Texas’s request for certification.” Letter to Jonathan F. Mitchell, Solicitor General of Texas, from Caroline T. Nguyen, Counselor to the Acting Assistant Attorney General, at 1 (Mar. 29, 2013).

We are concerned that DOJ has not followed through on that promise. Two-and-a-half months after your attorney told us that DOJ would “begin reviewing” Texas’s certification request, DOJ now informs us that your review has not yet begun. Letter to Hon. Greg Abbott, Attorney General of Texas, from Alexa Chappell, Intergovernmental Liaison, at 1 (June 14, 2013) (stating that DOJ “will begin reviewing [Texas’s application] now”). Please confirm that DOJ’s review now has begun, and please provide the date by which Texas can expect DOJ’s certification decision. If you cannot provide a precise date, please give us a rough estimate or an outer boundary on the timeline for deciding whether to approve Texas’s application.

Our concerns about these delays are heightened by DOJ’s misapprehension of the authority that Section 2265 confers on Attorney General Holder. For example, DOJ’s letter of June 14, 2013, says that the Attorney General will not rule on Texas’s application for certification until after DOJ issues a final rule regarding the procedural requirements for certification. But the Attorney General has no authority to delay his decision on account of DOJ’s failure to enact these regulations. Agency rules have only future effect and cannot apply retroactively unless the statute that confers rulemaking powers explicitly authorizes the agency to promulgate retroactive rules. *See* 5 U.S.C. §§ 551(4), 559; *Bowen v. Georgetown Univ. Hosp.*, 448 U.S. 204 (1988). Texas submitted its application for certification long before the eventual promulgation of DOJ’s regulations, and it therefore cannot be judged by agency rules that did not exist when the application was submitted. In addition, 28 U.S.C. § 2265(a)(3) prohibits the Attorney General from creating additional “requirements for certification” beyond those “expressly stated” in 28 U.S.C. § 2265(a)(1). Texas clearly satisfies those statutory requirements, and it is entitled to prompt certification from the Attorney General.

Thank you again for considering our application.

Sincerely,

A handwritten signature in black ink that reads "Jonathan F. Mitchell". The signature is written in a cursive style with a large, stylized initial "J".

Jonathan F. Mitchell
Solicitor General

cc: Eric H. Holder, Jr., Attorney General ✓
Alexa Chappell, Intergovernmental Liaison
Brette Steele, Office of Legal Policy

Enclosures



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 11, 2013

Eric H. Holder, Jr.
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

Dear Attorney General Holder:

On behalf of the State of Texas, I respectfully request that you certify our State under 28 U.S.C. § 2265. Our enclosed application demonstrates that Texas satisfies all of the statutory criteria for certification.

I also respectfully ask that you let me know the date by which Texas can expect a certification decision.

Sincerely,


Greg Abbott
Attorney General of Texas

cc: James Cole, Deputy Attorney General
Elana Tyrangiel, Office of Legal Policy

Enclosure



U.S. Department of Justice

Office of Legal Policy

Washington, D.C. 20530

March 29, 2013

Jonathan F. Mitchell
Texas Solicitor General
P.O. Box 12548
Austin, TX 78711-2548

Dear Mr. Mitchell:

Thank you for your phone call and for your follow-up letter regarding Texas's decision to submit a request for certification under Section 2265 of Title 28.

As your letter acknowledges, the Department has been and remains engaged in a rulemaking process in connection with the requirements of Section 2265. Certification Process for State Capital Counsel System, 76 Fed. Reg. 11705 (Notice of Proposed Rulemaking, or NPRM); Certification Process for State Capital Counsel System, 77 Fed. Reg. 7559 (Supplemental Notice of Proposed Rulemaking, or SNPRM). The NPRM proposed a certification procedure by which the Department would solicit and consider public comments on any request for certification with the goal of enabling the Attorney General to make sound certification decisions on the basis of a robust record that takes into account views of all interested parties. The NPRM also proposed defining within reasonable bounds Chapter 154's requirements for certification, in part to provide notice to interested parties of the standards that the Attorney General would apply in making certification decisions.

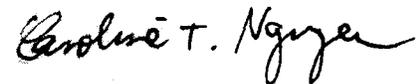
In formulating the final rule, the Department has given careful consideration to the comments submitted by interested parties, including the State of Texas's comments submitted in connection with the SNPRM. We continue to make progress on the rulemaking—as our recent submission of the final rule for review under Executive Order 12866 indicates—and we expect that the final rule will issue in the near future. In the meantime, the Department will begin reviewing the materials you submitted in support of Texas's request for certification on the expectation that it may help speed the ultimate determination of the certification request by the Attorney General. At your request, we will also seek to ascertain whether there is any additional information that you can provide now, even though it may not be possible for us to immediately determine all information that is needed.

While we cannot provide at this time a precise date certain by which a decision will be made, please do not hesitate to call again should you or another attorney in your office have any questions about the status of the Department's progress in this area; if there is any updated information we are then in a position to provide, we will be glad to provide it. But I should add,

Letter to Jonathan F. Mitchell
March 29, 2013
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on a personal note, that I will be leaving the Department at the end of this month for a new position in the private sector. In my absence, Brette Steele (brette.steele@usdoj.gov; (202) 514-4601) will normally be the best point of contact, and please continue to copy Acting AAG Elana Tyrangiel on any correspondence.

Sincerely,

A handwritten signature in black ink that reads "Caroline T. Nguyen". The signature is written in a cursive style with a large, looping "C" and "N".

Caroline T. Nguyen
Office of Legal Policy



U.S. Department of Justice

Washington, DC

The Honorable Greg Abbott
Attorney General
State of Texas
PO Box 12548
Austin, TX 78711-2548

JUN 14 2013

Dear Attorney General Abbott:

This responds to your letter to the Attorney General dated March 11, 2013, requesting certification of the State of Texas under 28 U.S.C. § 2265. The Department is in receipt of the materials submitted in connection with your letter, namely, the 16-page document entitled "State of Texas's Application for Certification under 28 U.S.C. § 2265," supported by seven accompanying attachments.

The Department has been and remains engaged in a rulemaking process in connection with the requirements of Section 2265. See Certification Process for State Capital Counsel System, 76 Fed. Reg. 11705 (Notice of Proposed Rulemaking); Certification Process for State Capital Counsel System, 77 Fed. Reg. 7559 (Supplemental Notice of Proposed Rulemaking). In formulating the final rule, the Department has given careful consideration to the comments submitted by interested parties, including the State of Texas, and we expect to issue the final rule in the near future. (The Department recently submitted the final rule for review under Executive Order 12866). Although the issuance of the final rule will precede a determination by the Attorney General of your State's request for certification, the Department will begin reviewing now the materials you have submitted on the expectation that it may help speed the ultimate determination of Texas's certification request. We accordingly are unable to provide at this time a precise date by which a decision on that request will be made, but the Department will proceed without any undue delay.

We hope you find this information helpful. Please do not hesitate to contact this office if we can be of further assistance in this or any other matter.

Sincerely,

A handwritten signature in black ink that reads "Alexa Chappell".

Alexa Chappell
Intergovernmental Liaison