



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 26, 1998

Mr. Jeffrey Schraeder
Legal Counsel
Texas Funeral Service Commission
510 S. Congress Avenue, Suite 206
Austin, Texas 78704-1716

OR98-2048

Dear Mr. Schraeder:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 118590.

The Texas Funeral Service Commission (the "commission") has received a request for personnel records, including payroll and travel information, pertaining to named commission investigators and to other commission employees and independent contractors involved in commission investigations during the past thirty-six months. You argue that these records relate to anticipated litigation and may be withheld under Government Code section 552.103. You also claim protection under sections 552.102 and 552.117.

Section 552.103(a), known as the litigation exception, excepts from required public disclosure information

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated

litigation to which the governmental body is a party. Open Records Decision No. 588 (1991). The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 (1986) and authorities cited therein. To demonstrate that litigation is reasonably anticipated, the governmental body must furnish *concrete* evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.*

Here, you advise that the requestor is an attorney representing Service Corporation International ("SCI"), owner and operator of funeral establishments both in Texas and elsewhere. You say that, pursuant to section 6D of article 4582b, Vernon's Texas Civil Statutes, the commission is currently investigating the provision of embalming services by SCI-affiliated funeral establishments, and that in connection therewith SCI has alleged that commission staff has acted inappropriately and that the commission acted unlawfully in using investigators who were not legally qualified. *See id.*, subsection (f) (licensure and other requirements for commission investigators). You submitted a complaint from SCI, with affidavits from SCI-affiliate employees, complaining of the conduct of the commission and its investigators in the investigation. You also provided a letter from SCI refusing to participate in alternative dispute resolution proceedings that the commission attempted to institute through the State Office of Administrative Hearings in order to resolve the complaint about commission personnel.

You contend that the commission anticipates that the investigation of SCI will advance to an administrative hearing conducted before the State Office of Administrative Hearings pursuant to section 6C of article 4582b, and that SCI will seek judicial review in the event of an adverse ruling. Section 6C provides that such hearings are subject to the Administrative Procedure and Texas Register Act ("APTRA"), V.T.C.S. article 6252-13a -- now the Administrative Procedure Act ("APA"), Government Code sections 2001.001 *et seq.* -- and that judicial review will be subject to the substantial evidence rule.

Moreover, you say that the commission anticipates that SCI will file a lawsuit against the commission and the state alleging improper conduct by the commission and its investigators and that the investigators were not legally qualified to act as such. You note the refusal of SCI to participate in alternative dispute resolution proceedings on these issues, as well as repeated threats to sue by the SCI chairman and chief executive officer. You say the "performance and qualifications of present and former [commission] employees" will be at issue in all these anticipated proceedings, and that the personnel records requested here directly relate to such issues. Indeed, SCI's attorney, in the request letter, specifically asks for "information as to the statutory qualifications of ... investigators."

Taking your arguments as a whole, we find that you have sufficiently established that the commission may reasonably anticipate litigation on issues to which the requested information relates. This office has previously found that agency hearings conducted under APTRA, now the APA, and subject to judicial review under the substantial evidence rule, may constitute litigation within the scope of the litigation exception. *See* Open Records

Decision No. 588 (1991). Also, while your account of SCI's threats to sue, standing alone, may be insufficient to establish the likelihood of litigation and the applicability of the litigation exception -- *see e.g.* Open Records Decision No. 452 (1986) -- it does carry some weight when taken together with your other arguments. Therefore, you may withhold the requested information at this time under section 552.103.¹ Since we have resolved this request under section 552.103, we need not, at this time, address your other arguments for withholding the requested information.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



William Walker
Assistant Attorney General
Open Records Division

WMW/ch

Ref: ID# 118590

Enclosures: Submitted documents

cc: Ms. Johnnie B. Rogers
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(w/o enclosures)

¹We assume, however, that none of the information in the records at issue has previously been made available to SCI. Absent special circumstances, once information has been obtained by all parties to litigation, either through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982). To the extent that SCI has seen or had access to these records, there would be no justification for now withholding such information from the requestor pursuant to section 552.103(a). Please note too that section 552.103(a) does not authorize withholding materials which have already been made available to the public. Open Records Decision No. 436 at 7 (1986).