



November 23, 1999

Mr. Mike Regan  
Acting Administrator  
Texas Funeral Service Commission  
510 South Congress Avenue, Suite 206  
Austin, Texas 78704-1716

OR99-3382

Dear Mr. Regan:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your multiple requests for decisions from this office were assigned the following identification numbers: ID# 129029, ID# 129053, ID# 129139, and ID# 129140. Because all of these requests may be resolved under the same legal theories, we address them all in this single ruling.

The Texas Funeral Service Commission (the "commission") received various requests under the Public Information Act for information pertaining to complaints, investigations, and subsequent formal actions taken by the commission with regard to various funeral directors, embalmers, and funeral establishments, including Service Corporation International.<sup>1</sup> You contend that the requested information is excepted from required public disclosure pursuant to sections 552.101 and 552.103 of the Government Code.<sup>2</sup>

The public release of complaint information is governed by law outside the Public Information Act. You contend that much of the requested information is made confidential under section 6D of article 4582b, V.T.C.S., as amended by the 76<sup>th</sup> Legislature in House Bill 3516. *See* Act of May 24, 1999, 76<sup>th</sup> Leg., R.S., ch. 1476, § 22, 1999 Tex. Gen. Laws 5053,

---

<sup>1</sup>Please note that to the extent these requests encompass minutes or tape recordings of the commission's meetings, this office has previously ruled on the public nature of those documents. *See* Open Records Letter No. 99-3201 (1999).

<sup>2</sup>Although you subsequently raised other exceptions to required public disclosure, you failed to raise those exceptions within the ten business days following the commission's receipt of the first several records requests. *See* Gov't Code § 552.301(a). Consequently, those exceptions are waived and we do not consider them here. *See* Open Records Decision No. 515 at 6 (1988).

section 6D(a) of article 4582b, V.T.C.S., require the commission to create an “information file” pertaining to each complaint it receives against funeral directors, embalmers, apprentices, and funeral establishments. The “information file” must contain a description of the complaint, the date on which the complaint was filed, the name of the complainant, a description of any information obtained by the commission after investigating the complaint, a description and date of any formal actions taken by the commission relating to the complaint, a description of the current status of the complaint, and other information that the commission considers appropriate. V.T.C.S. art. 4582b, § 6D(b); *see also* Occ. Code § 651.203(a).

As amended by House Bill 3516, section 6D(d) now provides that “[t]he information file is public information, except for information relating to a complaint that has not reached a final disposition.” You thus contend that, to the extent the records at issue pertain to commission investigations that have not “reached a final disposition,” those records are made confidential under section 6D(d). We note, however, that section 28 of House Bill 3516 provides as follows:

(a) This Act takes effect September 1, 1999.

(b) The changes in law made by this Act apply only to an offense committed on or after the effective date of this Act. For purposes of this section, an offense is committed before the effective date of this Act if any element of the offense occurs before that date. *Any offense committed before the effective date of this Act is covered by the law in effect when the offense was committed, and the former law is continued in effect for that purpose.*

(c) The changes in law made by this Act apply only to a proceeding commenced on or after the effective date of this Act. *A proceeding that is commenced before the effective date of this Act is governed by the law in effect when the proceeding was commenced, and that law is continued in effect for that purpose.*

Act of May 24, 1999, 76<sup>th</sup> Leg., R.S., ch. 1476, § 28, 1999 Tex. Gen. Laws 5053, 5066 (emphasis added). Because all of the commission’s investigations regarding the complaint files at issue were commenced prior to the effective date of House Bill 3516, we conclude that these records are subject to the provisions of section 6D(d) prior to the 1999 amendment.

Section 6D(d), prior to its amendment, provides that the information file is public, except for “information obtained by the commission after investigating the complaint.” *See also* V.T.C.S. art. 4582b, § 6D(c) (commission required to inform parties to complaint on quarterly basis as to status of complaint “unless the notice would jeopardize an undercover

investigation”). Thus, the categories of information made public under section 6D(d) must be released to each of the respective requestors, regardless of the current status of the complaint. See Open Records Decision Nos. 161 (1977), 146 (1976), 43 (1974) (information specifically made public by statute not protected by “litigation” exception). We have marked the representative sample of documents you submitted to this office to indicate the types of information the commission must either release or withhold under section 6D(d).<sup>3</sup>

Finally, the commission also received requests for the following categories of information:

all memos or reports written by commission staff members or employees relating to commissioners Tommy Metcalf and Robert Duncan; and

all correspondence between the commission and employees, agents, lobbyists, or representatives of Service Corporation International since January 1, 1999.

You contend the commission may withhold these records from the public pursuant to section 552.103 of the Government Code. To secure the protection of section 552.103, a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin 1997, no pet.); Open Records Decision No. 588 at 1 (1991).

You have submitted to this office in connection with these requests a copy of two lawsuits filed against the commission by former employees for wrongful termination. You further state that the commission anticipates being a party to a contested hearing before the State Office of Administrative Hearings regarding administrative penalties against Service Corporation International. After reviewing the filed pleadings and your arguments, we conclude that you have met your burden of demonstrating that litigation involving the commission is both pending and reasonably anticipated. We further conclude, after reviewing the documents you submitted to this office, that those memoranda relate to that litigation. We have indicated the documents the commission may withhold pursuant to

---

<sup>3</sup>In reaching our conclusion here, we assume that the “representative sample” of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision No. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

section 552.103.<sup>4</sup> You did not, however, submit to this office any documents responsive to the request for correspondence between the commission and Service Corporation International; consequently, all such records are deemed to be public and must be released. *See* Gov't Code § 552.301(e)(1)(D).

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.

Sincerely,



Kay Hastings  
Assistant Attorney General  
Open Records Division

KHH/RWP/nc

Ref.: ID# 129139

Encl.: Submitted documents

cc: Mr. Robert Bryce  
Staff Writer  
The Houston Chronicle  
P.O. Box 49066  
Austin, Texas 78765  
(w/o enclosures)

---

<sup>4</sup>In reaching this conclusion, however, we assume that the opposing parties in all of the lawsuits and contested hearings have not had prior access to the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). We also note that the applicability of section 552.103 ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Ms. Michelle Moon  
The News of Texas  
1000 East 6<sup>th</sup> Street  
Austin, Texas 78702-3209  
(w/o enclosures)

Ms. Tiffany Dunne  
Associate Producer  
The Texas Network  
P. O. Box 701428  
San Antonio, Texas 78270-1428  
(w/o enclosures)

Mr. John K. Horany  
Elm Place, Suite 4579  
1401 Elm Street  
Dallas, Texas 75202  
(w/o enclosures)

Ms. Jann Scherbarth  
Attorney at Law  
1011 Highway 6 south, Suite 30  
Houston, Texas 77077  
(w/o enclosures)

Ms. Amy J. Sonnenberg  
Robert F. Stein & Associates  
The Lyric Office Centre  
440 Louisiana Street, Suite 440  
Houston, Texas 77002-1693  
(w/o enclosures)

Ms. Becky Miller  
Special Projects Producer  
Fox 4 News  
400 North Griffin  
Dallas, Texas 75202  
(w/o enclosures)

Ms. Anna M. Zimmerman  
Smith & Carlson, P.C.  
510 North Valley Mills Drive, Suite 304  
Waco, Texas 76710-6076  
(w/o enclosures)

Ms. Donna Ressler  
Fox 4 News  
400 North Griffin  
Dallas, Texas 75202  
(w/o enclosures)