



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 24, 1994

Mr. Larry A. Farrow
Executive Director
Texas Funeral Service Commission
8100 Cameron Road, Bldg. B,
Suite 550
Austin, Texas 78753

Letter Opinion No. 94-024

Re: Whether the investigations of the Texas
Funeral Service Commission are deemed confi-
dential pursuant to V.T.C.S. article 4582b,
section 6D(d) (ID# 16035)

Dear Mr. Farrow:

The Texas Funeral Service Commission (the "commission") has requested the attorney general's opinion concerning whether the investigations of the commission are deemed confidential and excepted from required public disclosure under section 552.101 of the Government Code.¹ The commission's request was originally presented as a request for this office's decision under section 552.301 of the Government Code. The open records request has since been resolved. The commission requests our opinion on this matter for reference in future cases. We are therefore responding through this informal letter opinion rather than a formal open records decision.

Article 4582b, V.T.C.S., creates the Texas Funeral Service Commission and defines the commission's responsibilities. Section 6D(a) states that the commission shall investigate all complaints received concerning a funeral director, embalmer, apprentice, or funeral establishment, and that the commission shall maintain an information file concerning each complaint. Section 6D(b) states:

The commission shall include in each information file 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

¹We note that the Seventy-third Legislature repealed article 6252-17a, V.T.C.S. Acts 1993, 73d Leg., ch. 268, § 46. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

complaint, and other information that the commission considers appropriate. [Emphasis added.]

You ask whether a licensee has a special right of access under section 552.023 of the Government Code to reports prepared in conjunction with an investigation of that licensee if the investigation is made in anticipation of an administrative hearing on that licensee. If the licensee is not entitled to the information during the pendency of the hearing, you ask whether the licensee is entitled to the information at some point in the future. We conclude that a licensee who is the subject of an investigation conducted by the commission pursuant to section 6D of article 4582b is not granted a special right of access under section 552.023 of the Government Code to information comprising part of the investigation.

Section 552.023(a) of the Government Code provides the following:

A person or a person's authorized representative has a special right of access beyond the right of the general public, to records and copies of records held by a governmental body that contain information relating to the person that is protected from public disclosure by laws intended to protect that person's privacy interests.

This provision prevents a governmental body from asserting an individual's own privacy as a basis for withholding records from him. See Open Records Decision No. 481 (1987). It does not, however, grant an individual a special right of access to information protected by exceptions in the Open Records Act or confidentiality provisions in other laws that protect some interest other than the person's privacy. See Open Records Decision No. 556 (1990).

In our opinion, the special right of access granted by section 552.023 is not applicable to investigatory information compiled pursuant to section 6D of article 4582b. Section 552.021 of the Open Records Act states that all information in the possession or control of a governmental body is public information, unless the information is protected by one of the enumerated exceptions to the act. Section 552.101 of the Open Records Act excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Article 4582b, section 6D(d), states:

The information file, except for information in the file obtained by the commission after investigating the complaint, is public information. *The information obtained after investigating the complaint is not public information.* [Emphasis added.]

It might be argued that the phrase "after investigating the complaint" protects only information compiled following the completion of an investigation and not information comprising part of the investigation itself. We believe this is incorrect for two reasons.

First, we note that section 6D(b) requires the information file to contain "a description of any information obtained by the commission *after* investigating the complaint." The use of this language here indicates that the term refers to a portion of the work product of the investigators -- specifically, information communicated to or obtained by the investigators in conjunction with the investigation. Second, violations of article 4582b may be punished with a reprimand, administrative penalty or, in some cases, imprisonment. *See* V.T.C.S. art. 4582b, §§ 6G, 6H, 7. The commission is responsible for either dispensing punishment in these matters or referring them to appropriate law enforcement authorities for prosecution. *Id.* It is likely that the legislature intended section 6D(d) to preserve the integrity of commission investigations and the confidentiality of investigative sources. Thus, we think that while the information files maintained by the commission concerning complaints generally are public records, information obtained through the commission's investigation of the complaint is specifically deemed "not public information." Section 6D(d) therefore effectively deems such information confidential for purposes of section 552.101 of the Government Code. *Cf.* Open Records Decision No. 495 (1988) (Open Meetings Act provisions limiting access to certified agendas "only upon" court order make such agendas confidential for section 552.101 purposes).

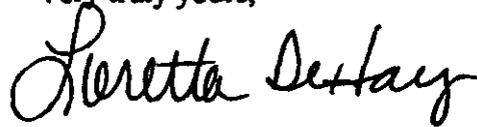
The foregoing discussion resolves your first question regarding section 552.023 of the Open Records Act. There is no indication in the language of article 4582b or its legislative history to suggest that section 6D(d) was enacted solely to ensure the privacy of licensees. To the contrary, there is, as noted above, clear evidence in the statute that the confidentiality provision also serves important law enforcement interests. Thus, while the privacy of licensees may have been a factor in the enactment of this provision, we think it far more likely that the legislature intended to protect the public's and the commission's interest in enforcing article 4582b. Accordingly, we conclude that a licensee who is the subject of an investigation conducted pursuant to section 6D of article 4582b is not granted a special right of access under section 552.023 of the Open Records Act to information compiled by the commission in connection with the investigation. *Compare* Open Records Decision No. 587 (1991) (since confidentiality provisions of Family Code section 34.08 protect law enforcement as well as privacy interests, there is no special right of access under former section 3B, now section 552.023, to information protected by section 34.08).

Your second question is whether a licensee may obtain investigatory information at any time following the completion of an administrative hearing involving the licensee. Because section 6D(d) does not establish a time limitation, such information is not public information either during or after the investigation. Furthermore, since we have determined that information protected by section 6D(d) is deemed confidential for purposes of Open Records Act section 552.101, the commission may not supply the information to the licensee at the commission's discretion. *See* Open Records Decision No. 166 (1977).

S U M M A R Y

Under section 6D(d) of V.T.C.S. article 4582b, information files maintained by the Texas Funeral Service Commission concerning complaints against licensees are public records, except that information obtained through the commission's investigation of the complaint is "not public information" under the statute. Information concerning the commission's investigations of licensees is therefore excepted from required public disclosure pursuant to section 552.101 of the Government Code.

Very truly yours,



Loretta R. DeHay
Assistant Attorney General
Opinions Committee