



Office of the Attorney General
State of Texas

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June 4, 1997

Ms. Eliza May
Executive Director
Texas Funeral Service Commission
510 South Congress Avenue, Suite 206
Austin, Texas 78704-1716

Letter Opinion No. 97-058

Re: Whether a "complaint review committee" that the Texas Funeral Service Commission has created is a "governmental body" for purposes of the Open Meetings Act, Government Code chapter 551 (ID# 30186)

Dear Ms. May:

You have asked us to consider whether the Complaint Review Committee (the "committee") of the Texas Funeral Service Commission (the "commission") is a "governmental body" subject to the Open Meetings Act (the "act").¹ We conclude the committee is subject to the act in its capacity as reviewer of investigations, but not in its capacity as participant in informal conferences.

Article 4582b, V.T.C.S., pertains to funeral directing and embalming and requires funeral directors,² embalmers,³ and funeral establishments⁴ to be licensed.⁵ Section 2 creates the commission, which is comprised of nine commissioners, four of whom are licensed embalmers or funeral directors and five of whom represent the general public.⁶ The commission must open all of its meetings to the public,⁷ and it is subject to the act.⁸

¹Gov't Code ch. 551.

²See V.T.C.S. art. 4582b, § 1.A.1 (defining "funeral director").

³See *id.* § 1.D. (defining "embalmer").

⁴See *id.* § 1.G. (defining "funeral establishment").

⁵See *id.* §§ 3, 4; see also *id.* §§ 1.A.2, 1.D.

⁶*Id.* § 2.A(1).

⁷*Id.* § 2.K.

⁸*Id.* § 2.O.

You inform us that the commission has created the committee, which is composed of two commissioners whom the commission chair appointed, one a licensed funeral director or embalmer and one a commissioner representing the general public, as well as two commission employees, the executive director and the general counsel. According to the information you have given us, the committee's functions are twofold. First, the committee reviews the results of investigations commission employees have conducted in response to complaints from members of the public or upon commission initiative. Second, the committee participates in informal conferences with licensees who are accused of violating article 4582b and whose licenses therefore may be subject to disciplinary action.

We begin our analysis of your question with a brief discussion of the act. Under the act, a governmental body must open all of its meetings to the public except in certain circumstances.⁹ For purposes of the act, a "governmental body" includes "a . . . committee . . . within the executive or legislative branch of state government that is directed by one or more elected or appointed members." A "meeting" is "a deliberation between a quorum of a governmental body, or between a quorum of a governmental body and another person during which public business or public policy over which the governmental body has supervision or control is discussed or considered or during which the governmental body takes formal action."¹⁰

Generally, a meeting of less than a quorum of a governmental body is subject to the act only in certain circumstances. For example, a committee of a governmental body is itself a governmental body subject to the act only if the committee supervises or controls public business or policy.¹¹ Conversely, a committee that serves a purely advisory function, with no power to supervise or control public business, is not a governmental

⁹Gov't Code § 551.002; *see id.* ch. 551, subch. D (listing exceptions).

¹⁰*Id.* § 551.001.

¹¹*See, e.g.,* Attorney General Opinions DM-284 (1994) at 3, JM-331 (1985) at 1-2, H-772 (1976) at 2; *see also Gulf Regional Educ. Television Affiliates v. University of Houston*, 746 S.W.2d 803, 809 (Tex. App.-Houston [14th Dist.] 1988, writ denied) (citing Attorney General Opinion H-772 (1976)). To be subject to the act, a committee of a governmental body also must be within the executive or legislative department of the state and be under the control of one or more elected or appointed members. *See* Attorney General Opinions DM-284 (1994) at 3, JM-331 (1985) at 2, H-772 (1976) at 2. The committee about which you ask is "an entity within the executive or legislative department of the state." Additionally, for purposes of this opinion, we assume that the committee is "under the control of one or more elected or appointed members," either because the commissioners are gubernatorial appointees or because the chair of the commission appoints two commissioners to the committee. Consequently, the sole issue before us is whether the committee supervises or controls public business or policy when it performs its dual functions.

body and is not subject to the act.¹² An entity that supervises but ultimately does not control public business or policy still qualifies as a governmental body.¹³

We turn now to consider whether the committee supervises or controls public business when it reviews investigations or when it participates in informal conferences with applicants or licensees. We will consider each of these functions separately, and we begin with the committee's investigation-review function.

You advise that the committee, when it performs its investigation-review function, is organized in accordance with article 4582b, section 2.S, which authorizes the commission to appoint committees from the commission to "consider and make recommendations" on matters the commission has referred to them.¹⁴ Article 4582b, section 6D(a) requires the commission to investigate each complaint it receives relating to a funeral director, embalmer, apprentice,¹⁵ or funeral establishment.¹⁶ If the commission determines that an individual or establishment has violated article 4582b or a rule of the commission, the commission may revoke, suspend, or probate the suspension of a license,¹⁷ assess an administrative penalty,¹⁸ and issue a reprimand against the violator.¹⁹

¹²Attorney General Opinion DM-284 (1994) at 2-3 (citing Attorney General Opinion JM-331 (1985) at 3).

¹³*Id.* at 2 (citing Attorney General Opinion H-438 (1974) at 3-4).

¹⁴V.T.C.S. art. 4582b, § 2.S. You do not ask, and we therefore do not consider, whether article 4582b, section 2.S, which provides that the commission may appoint committees "*from the commission*" (emphasis added), authorizes the commission to appoint a committee the membership of which includes individuals who are not members of the commission. Cf. Letter Opinion No. 90-33 (1990) at 1 (concluding that word "committee" in Government Code section 444.023(a) refers to groups composed of members of Texas Commission on the Arts).

¹⁵Article 4582b, section 3.D.1 requires an applicant for an embalmer's license to have completed a provisional license program of at least 12 consecutive months under the personal supervision and instruction of a licensed embalmer. Similarly, section 3.D.2 requires an applicant for a funeral director's license to complete a provisional license program of at least 12 consecutive months. Prior to 1993, article 4582b provided for apprentices to funeral directors and embalmers. In 1993, however, the legislature amended several sections of article 4582b to change the word "apprentice" to "provisional licensee." See Act of May 27, 1993, 73d Leg., R.S., ch. 995, § 5, 1993 Tex. Gen. Laws 4354, 4356-64 (amending article 4582b, sections 3.A, B(1)(d), C(1)(d), D); *id.* § 18, at 4371 (providing that any person serving as apprentice on effective date of enactment will be converted to provisional licensee under article 4582b).

¹⁶See also V.T.C.S. art. 4582b, § 6.D(f) (requiring commission to employ or contract for services of investigators).

¹⁷*Id.* §§ 3.H, 4.D.

¹⁸*Id.* § 6.G(a).

¹⁹*Id.* § 6.H(a).

You describe the committee's investigation-review function as follows:

The Committee's review focuses on whether sufficient evidence has been produced to indicate that there has been a violation by a licensee of Texas Mortuary Law. In performing this function, the Committee receives written and oral reports from the Commission's staff investigators and reviews various documents and statements obtained as part of the investigation.²⁰

....

Where the Committee determines that insufficient evidence exists to indicate a violation of Texas Mortuary Law, it recommends to the full Commission that the matter be closed. Any action to actually close the case is taken by the Commission, with the commissioner members of the Committee not voting, in a properly noticed open meeting.

Where the Committee concludes that sufficient evidence exists to indicate a violation, it may direct the staff to proceed by instituting an administrative proceeding to take action with respect to the license. Alternatively, the Committee may recommend to the full Commission that administrative penalties be assessed or warnings issued. Any action to assess such penalties or to issue such warnings, however, is taken by the Commission, with the commissioner members of the Committee not voting, in a properly noticed open meeting. [Footnote added.]

Article 4582b, section 2.S, V.T.C.S., which you indicate authorizes the commission to delegate the investigation-review function to a committee, expressly limits the committee to considering and making recommendations on matters the commission has referred to it.²¹ While the committee role vis-à-vis the commission is largely advisory, it supervises commission employees in their investigations. Notably, as you state, after the

²⁰You point out that this office, in Letter Opinion No. 94-024, concluded that V.T.C.S. article 4528b, section 6D(d) renders the commission's information files, other than information the commission has obtained through an investigation concerning complaints against licensees, public records for purposes of the Open Records Act, Gov't Code ch. 552. Letter Opinion No. 94-024 (1994) at 3. Consequently, section 552.101 of the Government Code excepts from required public disclosure information concerning the commission's investigations of licensees. Of course, the Open Meetings Act and the Open Records Act are two separate statutes, although they serve identical purposes. Exceptions to required public disclosure under the Open Records Act do not provide a governmental body grounds to discuss the information in a closed meeting. See Attorney General Opinion JM-595 (1986) at 4.

²¹The legislature added subsection S to article 4582b, section 2 in 1993. See Act of May 27, 1993, 73d Leg., R.S., ch. 995, § 4, 1993 Tex. Gen. Laws 4354, 4355-56. We found no indication in the legislative history of the intent behind section 2.S.

committee reviews various documents the staff has compiled during the investigation, it "may direct the staff to proceed by instituting an administrative proceeding to take action with respect to the license." In our opinion, in directing the actions of the staff with regard to investigations, the committee supervises and controls public business.²² We therefore conclude that the committee is a governmental body subject to the act when it reviews investigations.²³

We next consider whether the committee is subject to the act when, in accordance with V.T.C.S. article 4582b, section 2.A(5), it informally confers with applicants or licensees who are accused of violating that article. Section 2.A(5) authorizes "[t]wo commissioners [to] participate in any informal conference that awaits a hearing as described by Section 6C of [article 4582b]. One of the two commissioners must be a licensed funeral director or embalmer and one must be a public member of the commission."

As a preliminary matter, we must consider whether, under section 2.A(5), commissioners may participate in an informal conference as a *committee* as opposed to individual commissioners. The legislature added section 2.A(5) to article 4582b in 1991, but, as it was originally enacted, subsection A(5) precluded any commissioner from participating in a proceeding relating to a case awaiting a hearing as described by article 4582b, section 6C.²⁴ In 1993 the legislature amended the subsection to provide as it does now, that two commissioners may participate in an informal conference.²⁵ The legislature amended section 2.A(5) by the enactment of the same bill that added subsection 2.S.²⁶

We find nothing in the statute suggesting a legislative intent to preclude a committee organized pursuant to section 2.S from participating in an informal conference, nor do we believe we may infer any such intent from the legislative history of the provisions at issue here. Consequently, we construe section 2.S to authorize the commission to refer to a committee for consideration and recommendation any matters, including matters involved in an informal conference. Accordingly, commissioners who

²²See Attorney General Opinion DM-284 (1994) at 2 (citing Attorney General Opinion H-438 (1974) at 3-4).

²³We assume for purposes of this opinion that the tasks the commission has delegated to the committee involve only considering and making recommendations about matters the commission has referred to the committee, as V.T.C.S. article 4582b, section 2.S requires.

²⁴See Act of May 27, 1991, 72d Leg., R.S., ch. 573, § 1, 1991 Tex. Gen. Laws 2032, 2033-34.

²⁵See Act of May 27, 1993, 73d Leg., R.S., ch. 995, § 3, 1993 Tex. Gen. Laws. 4354, 4355. We found no indication in the legislative history of the legislature's specific intent behind the 1993 amendments to section 2.A(5).

²⁶See *id.* §§ 3, 4, 1993 Tex. Gen. Laws 4354, 4355-56.

attend an informal conference pursuant to section 2.A(5) may attend as a committee organized pursuant to section 2.S.

As we understand the committee's functions with regard to informal conferences, committee members attend the informal conference and may recommend resolutions concerning the case to the commission for its consideration. We do not understand the committee to have any power to make final decisions related to the case. Indeed, section 2.S expressly limits a committee to making recommendations on matters the commission has referred to it. Moreover, we do not believe the committee performs any supervisory function in relation to its participation in informal conferences. We therefore conclude that the act does not apply to the committee when the committee participates in informal conferences.

S U M M A R Y

A complaint review committee that the Texas Funeral Services Commission has created is a "governmental body" for purposes of the Open Meetings Act, Government Code chapter 551, when it functions as reviewer of the commission's investigations into alleged violations of article 4582b, V.T.C.S., because it performs in a supervisory capacity. Accordingly, the committee is subject to the Open Meetings Act, Government Code chapter 551, when it reviews investigations.

On the other hand, when the complaint review committee functions as a participant in informal conferences relating to cases awaiting a hearing as described in V.T.C.S. article 4582b, section 6C, its role is purely advisory; it does not supervise or control public business. Accordingly, when it functions as a participant in informal conferences, the committee is not a governmental body for purposes of, and is not subject to, the Open Meetings Act.

Yours very truly,



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Opinion Committee