



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 12, 2004

Ms. Mitzi Chafetz  
Public Information Officer  
Texas Funeral Service Commission  
P. O. Box 12217  
Austin, Texas 78711

OR2004-9642

Dear Ms. Chafetz:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 212995.

The Texas Funeral Service Commission (the "TFSC") received six requests from the same requestor for (1) communications relating to a named member of the Texas Legislature during a specific time interval; (2) communications relating to an article that appeared in the *Austin Chronicle*; (3) the TFSC's policy and procedures manual for a specific time interval; (4) records relating to three particular TFSC telephone numbers for a specific time interval; (5) records relating to cell phones assigned to three named individuals for the same time interval; and (6) communications between the same three individuals and former TFSC employees for the same time interval. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and have reviewed the information you submitted.<sup>1</sup>

Section 552.103, the "litigation exception," provides in part:

- (a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or

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<sup>1</sup>This letter ruling assumes that the submitted "representative copies" of information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes TFSC to withhold any information that is substantially different from the submitted information. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

...

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The governmental body that raises section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of this exception to the information at issue. To meet this burden, the governmental body must demonstrate that: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App. — Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. — Houston [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990) Id.*

You indicate that the submitted information relates to an unemployment compensation claim against TFSC. You also indicate that the claim was pending at the Texas Workforce Commission (the "TWC") when the TFSC received this request. You therefore assert that the TFSC is a party to pending litigation for the purposes of section 552.103. We note that a contested case under the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code, constitutes litigation for purposes of section 552.103. *See Open Records Decision No. 588 at 7 (1991)* (contested case under statutory predecessor to APA constituted litigation for purposes of statutory predecessor to Gov't Code § 552.103). Accordingly, we will consider whether a claim for unemployment compensation is a contested case under the APA. The TWC administers the Texas Unemployment Compensation Act (the "Act") under title 4 of the Labor Code. The Act is found in subtitle A of title 4. *See Labor Code § 201.001 et seq.* The provisions governing the TWC are found in subtitle B of title 4. *See id.* § 301.001 *et seq.* Section 301.0615 of the Labor Code states that except as otherwise provided by title 4, a hearing conducted under title 4 is not subject to subchapters C-H of the APA. *See id.* § 301.0615(a)(2). Subchapters C-H are applicable to contested cases under the APA. Moreover, section 2001.224 of the APA provides that subchapters C-H "do not apply to a hearing by the [TWC] to determine whether or not a claimant is entitled to unemployment compensation[.]" Gov't Code § 2001.224. We therefore find that you have not demonstrated that the claim against the TFSC for unemployment compensation constitutes litigation for the purposes of section 552.103 of the Government Code. Consequently, we conclude that the TFSC may not withhold any of the submitted

information under section 552.103. As you claim no other exception to disclosure, the submitted information must be released to the requestor in its entirety.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

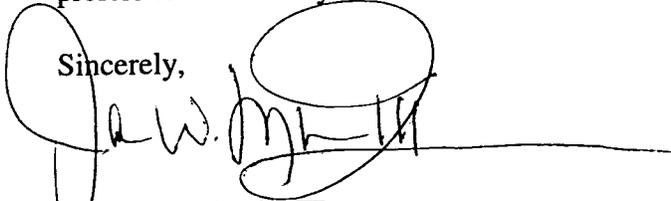
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge

this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris, III", with a long horizontal line extending to the right. There are two large, hand-drawn circles around the initials "J.W." and the name "Morris".

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/krl

Ref: ID# 212995

Enc: Submitted documents

c: Ms. Deborah B. Almasov  
609 Buckboard Boulevard  
Round Rock, Texas 78681  
(w/o enclosures)