



Office of the Attorney General  
State of Texas

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February 23, 1998

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

Letter Opinion No. 98-014

Re: Whether the Texas Funeral Service Commission may by rule exempt a funeral establishment from the requirement of having an embalming preparation room (RQ-1019)

Dear Ms. May:

You have asked this office whether the Texas Funeral Service Commission may by rule exempt funeral establishments which engage in funeral directing and the sale of funeral merchandise, but do not provide embalming services, from the requirement of having embalming preparation rooms in their facilities. Since the requirement is statutory and applies by its terms to funeral establishments generally, the commission may not do so.

As you point out, article 4582b, section 1(G), V.T.C.S., defines a funeral establishment as a place of business which supplies "embalming and/or funeral directing." Article 4582b, section 1(L), by contrast, defines a commercial embalming establishment as "one that embalms for licensed funeral establishments and does not sell any services or merchandise directly or at retail to the public. . . ." However, the statute makes no provision for an establishment which only provides funeral services and merchandise, and does not provide embalming. Such a business, accordingly, falls within the definition of "funeral establishment."

Article 4582b, section 4(C) requires "[e]ach funeral establishment . . . to have a physical plant, equipment and personnel consisting" *inter alia* of:

4. A preparation room containing facilities, equipment, and supplies required by commission rule to ensure the provision of adequate embalming services and other facilities necessary to comply with the sanitary code of the state and the municipality in which the room is located.

While commercial embalmers are exempted from certain requirements of section 4(C), the statute contains no such exemption for any category of funeral establishments from section 4(C)(4). By its terms, the statute requires all such businesses to have embalming preparation rooms.

A regulatory agency may not amend a statutory scheme by rule. *See State v. Jackson*, 376 S.W.2d 341, 344-45 (Tex. 1964). Accordingly, the commission has no authority to exempt any category of funeral establishment from section 4(C)(4). A brief presented to this office suggests that either the reference to commission rule in section 4(C)(4) or section 4(F)'s grant to the commission of rule-making authority which shall "comply with and shall effect the intent of" section 4 gives the commission the requisite authority. We cannot agree. First, the citation of commission rule in section 4(C)(4) refers grammatically to "facilities, equipment, and supplies," not to "[a] preparation room." Second, the fact that section 4(F) speaks of the commission's authority "to effect the intent" of section 4 does not permit the commission by rule to countermand the plain language of the statute.

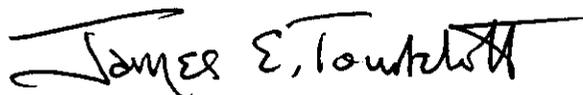
We sympathize with the commission's policy concerns. Clearly, an establishment required to have facilities it does not use has therefore an added cost of doing business which it will likely pass along to the ultimate consumer, the purchaser of funeral services. However, such policy considerations may not govern either commission rule-making or the legal opinions of this office. Rather, such considerations are the province of the legislature.

As your second question presupposes an affirmative answer to your first, we do not consider it.

### S U M M A R Y

The Texas Funeral Service Commission cannot by rule exempt funeral establishments which do not provide embalming services from the statutory requirements of article 4582b, section 4(C)(4), V.T.C.S.

Yours very truly,



James E. Tourtelott  
Assistant Attorney General  
Opinion Committee