

Mass Fatality Management, Legal Authorities
(draft 1-16-08)

FEDERAL LAWS

United States Constitution, First Amendment: Freedom of Religion (not copied)

FEDERAL REGULATIONS

HIPAA Privacy Regulations, 45 Code of Federal Regulation Section 164.512(g), Standard: Uses and Disclosures About Decedents: Allows covered entities to disclose protected health information to a coroner or medical examiner for purpose of identifying a deceased person, determining a cause of death, or other duties as authorized by law. Authorizes a covered entity to disclose protected health information to funeral directors consistent with applicable law as necessary to carry out their duties. If necessary for funeral directors to carry out their duties, disclosure may occur prior to and in reasonable anticipation of the individual's death.

Section 164.512(f), Standard: Disclosures for Law Enforcement Purposes: Allows disclosure of protected health information for law enforcement purpose to a law enforcement official if certain conditions are met. Allows for disclosure of limited information to law enforcement officials for the purpose of identifying or locating a suspect, fugitive, material witness, or missing person. Allows for disclosure to law enforcement officials if individual is or is suspected to be a victim of a crime. Allows disclosure about a deceased individual to a law enforcement official for purpose of alerting law enforcement of the death if the covered entity has a suspicion that such a death may have resulted from criminal conduct. Allows disclosure to a law enforcement official from providers providing emergency health care in response to a medical emergency if necessary to alert law enforcement in regard to certain criminal matters.

Section 164.510(b)(4), Use and Disclosures for Disaster Relief Purposes: Allows use and disclosure of protected health information to a public or private entity authorized by law or by its charter to assist in disaster relief efforts to assist in notifying, identifying, or locating persons.

When used for planning for mass casualties, the provisions above must be considered with the power of the governor under the Disaster Act, to "suspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders or rules of a state agency if strict compliance with the provisions, orders or rules would in any way prevent, hinder, or delay necessary action in coping with a disaster."¹

This provision would certainly allow the governor to suspend most or all of the provisions of statutes like that of the funeral service commission, which is primarily an occupational licensure statute.

Unresolved Issue: Legal authorities have difficulty in sharply distinguishing between rules and statutes that are "regulatory" (and may therefore be suspended in times of declared disaster) and "substantive" which by implication, may not be suspended. The current governor, in previous declarations, simply declares "As provided in Section 418.016, all rules and regulations that may inhibit or prevent prompt response to this threat are suspended for the duration of the incident."² This language avoids the suspension of statutes³, and leaves the identity of specific rules to be suspended to state agency heads.

When used for planning for mass casualties, the provisions above must be considered with the power of the department, or local health authority to impose "control measures" to control communicable disease⁴. These laws give public health authorities, including the department, broad powers to order measures imposed on individuals, property or common carriers. For legal purposes, human remains should be

¹ Government Code §418.016.

² This language is found in the governor's most recent declaration of disaster, that for Hurricane Dean, August 17, 2007, but identical language appears in each of his previous declarations. See: <http://www.governor.state.tx.us/divisions/press/proclamations>

³ Tex. Const. Art. II, §1 provides for three separate branches of government. The suspension of statutes by the executive is arguably an impermissible delegation of the legislative function, and a violation of Tex. Const. Art. I §28: "No power of suspending laws in this State shall be exercised except by the Legislature."

⁴ Health and Safety Code Chapter 81, subchapter E.

considered “property”. Though these powers do not include suspension of conflicting laws, they may protect individuals acting in compliance with them, from civil liability⁵

TEXAS LAWS

Texas Constitution, Article 1, Bill of Rights, Section 6, Freedom of Worship

Health and Safety Code, Section 241.153, Disclosure Without Written Authorization: Hospital patient’s health care information may be disclosed without the patient’s authorization if the disclosure is to a federal, state, or local government agency or authority to the extent authorized or required by law.

Medical Practice Act, Occupations Code, Ch. 159, Section 159.004: Provides for disclosure of physician’s medical records without patient consent to a governmental agency if the disclosure is required or authorized by law.

Code of Criminal Procedure, Ch. 49, Inquests Upon Dead Bodies: Definitions are in Article 49.01.

The term “physician” is limited to a Texas licensed physician. Subchapter A applies to counties that do not have a medical examiners office (most counties in Texas). It requires a justice of the peace to conduct inquests into deaths under many circumstances, including those that occur without a physician in attendance, when a physician is unable to ascertain cause of death or where death may have been caused by unlawful means. The law grants many investigation powers to the justice conducting the inquest, allows for tests to be conducted on the body, disinterment, etc. Subchapter B applies to medical examiners. Counties of over 1 million that lack “a reputable medical school” are required to have medical examiners. Medical Examiners are required to conduct investigations in similar circumstances including all of those above.

“No autopsy shall be required by the medical examiner as a prerequisite to cremation in case death is caused by the pestilential diseases of Asiatic cholera, bubonic plague, typhus fever or smallpox.” And “A medical examiner is not required to perform an autopsy on the body of a deceased person whose death was caused by a communicable disease during a public health disaster.” (Art. 49.25, §10). A similar provision exempts the inquests of justices of the peace (Art. 49.10(d)).

This law provides for a 48-hour waiting period between death and cremation except during a public health disaster (Art. 49.25, §10a) when the commissioner may designate diseases other than the “pestilential diseases” listed above.

Unresolved issue: The provisions above would greatly facilitate disposal of remains where the cause of death was a communicable disease. But these provisions would not be of any use if the cause of mass casualties was from other natural or man-made causes. It is unclear how this provision would operate if the cause of death was both disease and man-made (e.g. bioterrorism)

Occupations Code, Ch. 651, Cemetery and Crematory Services, Funeral Directing, and Embalming

This law governs the practice of funeral services. Specifically, the Funeral Service Commission (FSC) regulates and licenses “embalmers”, “funeral directors”, “cemeteries” and “crematory establishments”. The law provides for both administrative and criminal penalties. These statutes, if enforced, could hamper the disposal of bodies on a large scale.

However there are several provisions that mitigate the impact in a mass casualty situation. First, many regulated activities would, for practical reasons, not be performed in a mass casualty event (e.g., embalming) where rapid and efficient disposal of remains was important. Second, the law prohibits regulated activities only if they are conducted for compensation⁶. Finally, though not mentioned in the Occupations Code, This is the type of “regulatory statute” that might be suspended by the governor under Government Code §418.016 (“Suspension of Procedural Laws and Rules”).

⁵ Health and Safety Code §81.007

⁶ Occ Code §§ 651.001(4), (6), (7) defining “embalmer”, “funeral director”, and “funeral directing”; 651.353, which suggests only cemeteries operated as businesses are subject to regulation, and exempts several types of church-owned, non-profit, and governmental cemeteries; 651.652, which exempts crematoria that do not sell goods or services.

If the mass casualty event was confined to this, or a few states, licensed individuals from other states might be allowed to practice under the provisions of the Emergency Management Assistance Compact.⁷ The statute provides for reciprocal licensing of individuals from other states, but the provisions would be cumbersome to implement in emergency situations.⁸

Unresolved issue: What is the definition of “for compensation” in the law? A family, church, or volunteer who inter a body is assumed to be uncompensated, but would government employees who inter or cremate remains be acting “for compensation” if they acted during an emergency?

Health and Safety Code, Ch. 193, Death Records: Section 193.010 addresses certificate of death by catastrophe.

This law requires a death certificate for each death in the state. This certificate contains both personal information on the decedent and medical information on the death⁹. The former typically comes from a friend or relative, the latter from an attending physician, or the physician who performs an autopsy. DSHS has authority to specify by rule the exact contents of the certificate¹⁰. By law, the certificate must be filed (with the local registrar) by the 10th day following the date of death.¹¹ “The person in charge of interment or in charge or removal of a body” is responsible for filing the death certificate (normally, the funeral director).¹² The penalty for failing to file the certificate is not specified, though licensed professionals who fail to comply with the law may be disciplined under their disciplinary rules.¹³ The law also requires the person in charge of the premises where internments are made to keep records of the internments.¹⁴

There is a special section for a “Certificate of Death by Catastrophe”, but this section seems to be concerned with documenting the death of a person whose remains are missing or destroyed by “the occurrence of a substantial force.”¹⁵ There is also a special provision for delayed registration of deaths where the normal 10-day filing is not performed.¹⁶ The department has written rules under the authority of this statute.¹⁷

Unresolved issues: This statute requires substantial documentation of each death, but it is not clear how this would be enforced during an event when the number of deaths makes such documentation impractical. The law appears unenforceable where no licensed professional (medical professional or funeral director) is involved in the death or disposal of the body. Since the law makes a provision for documenting the death up to a year after the event, the statute contemplates a certain level of non-compliance. The provision on “Death by Catastrophe” would be beneficial where the event that caused the deaths also destroyed the remains or made them difficult to locate, but could not be used in other events.

Health and Safety Code, Ch. 671, Determination of Death and Autopsy Reports. This statute clarifies when death occurs, and who may pronounce it. It does not state when autopsies are required but does define “autopsy report” and describe how they are filed and how they may be used.

Health and Safety Code, Ch. 694, Burial. This short statute requires DSHS to “regulate the disposal transportation, interment, and disinterment of dead bodies to the extent reasonable and necessary to protect public health and safety.”¹⁸ It also requires and allows local governments to provide for the burial of indigents.¹⁹

⁷ Health and Safety Code § 778.001. Article V covers the practice of licensed professionals from other states.

⁸ Occ. Code § 651.259

⁹ Health and Safety Code §§193.004 & .005

¹⁰ Health and Safety Code §193.001

¹¹ Health and Safety Code §193.003(a)

¹² Health and Safety Code §193.002

¹³ Health and Safety Code §193.0041

¹⁴ Health and Safety Code §193.009

¹⁵ Health and Safety Code §193.0010

¹⁶ Health and Safety Code §193.007

¹⁷ Title 25, Texas Administrative Code, Chapter 181

¹⁸ Health and Safety Code §694.001

¹⁹ Health and Safety Code §§694.002 &.003

Unresolved Issue. This statute gives broad authority to the department. In fact there are many other laws that deal with these same issues and the department has used the regulatory authority granted here very sparingly. Since this law is explicitly designed to protect public health it might trump other statutes whose purposes are professional licensure (Occupations Code Chapter 651) and proper registration of vital statistics (Health and Safety Code Chapter 193).

Health and Safety Code, Ch. 716, Crematories. Implementation of this statute is the responsibility of the Texas Funeral Service Commission.²⁰ Several sections cover such topics as “location of a crematory”, “waiting period for cremation”²¹, “cremation authorization”, “receipt and identification of remains”, “cremation process” and “cremation containers”.

Though it requires careful reading to determine, this statute applies mainly to licensed, for profit establishments.²²

TEXAS RULES

Title 25 Texas Administrative Code Ch. 181, Vital Statistics: Includes transportation of dead bodies

Title 25 Texas Administrative Code §97.13, “Death of a Person with Certain Communicable Diseases”:

- (a) If a physician has knowledge that a person had, at the time of death, a communicable disease listed in subsection (c) of this section, then the hospital administrator, clinic administrator, nurse, or the physician shall affix or cause to be affixed a tag on the body, preferably the great toe.
- (b) The tag shall be on card stock paper and shall be no smaller than five centimeters by ten centimeters. The tag shall include the words "COMMUNICABLE DISEASE--BLOOD/BODY SUBSTANCE PRECAUTIONS REQUIRED" in letters no smaller than six millimeters in height. The name of the deceased person shall be written on the tag. The tag shall remain affixed to the body until the preparation of the body for burial has been completed.
- (c) Diseases that shall require tagging are acquired immune deficiency syndrome (AIDS); anthrax; avian flu, brucellosis; cholera; Creutzfeldt-Jakob disease; Hantavirus pulmonary syndrome; hepatitis, viral; human immunodeficiency virus (HIV) infection; plague; Q fever; rabies; relapsing fever; Rocky Mountain spotted fever; severe acute respiratory syndrome (SARS); smallpox; syphilis; tuberculosis; tularemia; and viral hemorrhagic fevers.
- (d) All persons should routinely practice standard infection control procedures when performing postmortem care on a deceased person who is known or suspected of having a communicable disease listed in subsection (c) of this section.

Title 22 Texas Administrative Code Ch. 201 – 209, Texas Funeral Service Commission (not copied)

²⁰ Health and Safety Code §§716.001(3) & 716.002

²¹ Health and Safety Code §716.004. This statute requires a 48 hour wait for cremation unless waived in writing by a justice of the peace, medical examiner, or court. Compare Code of Crim. Proc. Art. 49.25, Sec. 10a which also waives the 48 hour requirement if death was caused by specified communicable diseases.

²² See the definitions in Health and Safety Code §716.001 (10)-(12), which cross reference Occupations Code Chapter 651.