



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 7, 1995

Mr. Richard Ybarra
Assistant Attorney General
General Counsel Division
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR95-1377

Dear Mr. Ybarra:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 36874.

The Elder Law and Public Health Division of the Office of the Attorney General (the "division") received an open records request for certain records pertaining to an ongoing investigation into the use of the drug Clorazil being conducted by the division and the Attorney General's Consumer Protection Division. The division has released to the requestor some of the requested documents but seeks to withhold four remaining records pursuant to section 552.103 of the Government Code.

To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 (1991) at 1. The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 (1986) at 4 and authorities cited therein. To demonstrate that litigation is reasonably anticipated, the governmental body must furnish evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.*

The division explains that the Office of the Attorney General is contemplating bringing suit under the Deceptive Trade Practices Act, Tex. Bus. & Com. Code § 17.47, and under sections 571.022 and 571.023 of the Texas Health and Safety Code for possible unlawful assertions concerning the beneficial effects of Clorazil and the detrimental

effects that improper use of that drug has on geriatric populations in psychiatric hospitals. The division contends that section 552.103(a) excepts the four documents from disclosure because the documents relate to the reasonably anticipated litigation that may result from the division's investigation.

We agree that in this instance the requested records relate to reasonably anticipated litigation and thus may be withheld from the public at this time pursuant to section 552.103 of the Government Code, despite the fact that the Office of the Attorney General has not yet determined that it will in fact "prosecute" this matter. In Open Records Decision No. 286 (1981), this office determined that where information relates to an active criminal investigation by law enforcement personnel and the district attorney has not yet determined whether to prosecute, the information may be withheld by the law enforcement agency until a decision to prosecute has been made. Similarly, we conclude here that until the Office of the Attorney General decides to initiate a "prosecution" under the Deceptive Trade Practices Act or the Health and Safety Code, the records at issue may be withheld pursuant to section 552.103(a).¹

In reaching this conclusion, we assume that none of the information in the records at issue has previously been made available to the potential opposing party in the litigation. Absent special circumstances, once information has been obtained by all parties to the litigation, either through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). To the extent the opposing party has seen or had access to these records, there would be no justification for now withholding such information from the requestor pursuant to section 552.103(a).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Margaret A. Roll
Assistant Attorney General
Open Records Division

¹Because we resolve your request for an open records decision under section 552.103(a), we need not address the other exceptions raised by the division.

MAR/RWP/rho

Ref.: ID# 36874

Enclosures: Submitted documents

cc: Mr. Andrew Prough
Citizens Commission on Human Rights
711 West 7th Street, Suite 110
Austin, Texas 78701
(w/o enclosures)