



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 23, 1997

Ms. Susan M. Cory
General Counsel
Texas Workers' Compensation Commission
Southfield Building, MS-4D
4000 South IH-35
Austin, Texas 78704-7491

OR97-1429

Dear Ms. Cory:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 106778.

The Texas Workers' Compensation Commission (the "commission") received a request for the "medically acceptable screening criteria and review procedures used by the Medical Review Division in the audit of a health care provider." You claim that the responsive information is excepted from required public disclosure by sections 552.103, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the documents at issue.

To show that section 552.103(a) is applicable, the commission must demonstrate that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. Contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation under section 552.103. Open Records Decision No. 588 (1991) at 7. Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the commission must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 (1989) at 5. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4.

The commission is authorized to investigate and audit health care providers. Labor Code § 413.013. Disputes arising from the commission's audits may result in proceedings subject to the Administrative Procedure Act. You state that the commission is currently

involved in several such disputes. You have also shown that the commission is currently attempting to audit a named health care provider. You further state that the audit may also subject a health care provider to possible criminal penalties. Labor Code § 413.043. In this instance, the commission has supplied this office with information which shows that an investigation and audit has or will take place, and the commission will take enforcement action as authorized by statute. We conclude that litigation is reasonably anticipated. We additionally find that the documents submitted by the commission are related to the reasonably anticipated litigation for the purposes of section 552.103(a). The documents may, therefore, be withheld pursuant to section 552.103.

Generally, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. We note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Because we are able to make a determination under section 552.103, we do not address your additional arguments against disclosure. 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,



Don Ballard
Assistant Attorney General
Open Records Division

JDB/rho

Ref: ID# 106778

Enclosures: Submitted documents

cc: Mr. John D. Pringle
Law Offices of John D. Pringle
807 Brazos, Suite 603
Austin, Texas 78701
(w/o enclosures)