



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 23, 1997

Mr. John T. Richards
Assistant General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR97-1433

Dear Mr. Richards:

You ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 106936.

The Texas Department of Health ("department") received a request for "a copy of the investigative report and related documents of the investigation," concerning the Alton Birthing Center (the "Center"), referenced by number 96-31149. In response to the request, you submitted to this office for review the information you assert is responsive.¹ 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 reviewed the submitted information.

Section 552.103(a), known as the litigation exception, excepts from required public disclosure information

- (1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and
- (2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

¹You have also submitted to this office information that apparently was sent for informational purposes only. In this ruling, we do not address the public disclosure of that information.

When asserting section 552.103(a), a governmental body must establish that the requested information relates to pending or reasonably anticipated litigation. Thus, under section 552.103(a) a governmental body's burden is two-pronged. The governmental body must establish that (1) litigation is either pending or reasonably anticipated, and that (2) the requested information relates to that litigation. *See 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.

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 (1986) at 4. Although section 552.103(a) gives the attorney for a governmental body discretion to determine whether section 552.103(a) should be claimed, that determination is subject to review by the attorney general. Open Records Decision Nos. 551 (1990) at 5, 511 (1988) at 3. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986).

You contend that the department anticipates enforcement action will occur as a result of the investigation of the Center. Specifically, you state that litigation is reasonably anticipated because the entity that is the subject of the request is under investigation, and "[t]his matter has been referred to the Attorney General for enforcement action." Although you do not specifically assert how the records submitted for our review relate to anticipated litigation, the attachments indicate on their face the required relationship. In this instance, after reviewing the submitted materials and your arguments, we conclude that you have made the requisite showing that litigation is reasonably anticipated and the submitted records are related to reasonably anticipated litigation for the purposes of section 552.103(a). *See* Open Records Decision No. 588 (1991).

The requested records may be withheld pursuant to section 552.103 only to the extent that the records have not been previously seen by the opposing parties in the anticipated litigation. Generally, absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982).² We also note that the applicability of this section ends once the litigation has been concluded.³ Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982) at 3.

²We note that among the submitted records, you included certain correspondence directed to a party in the anticipated litigation. 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 must be disclosed.

³However, information deemed confidential by law may not be waived and should continue to be withheld once the litigation has concluded. Open Records Decision Nos. 490 (1988), 463 (1987). We caution that section 552.352 of the Open Records Act imposes criminal penalties for the release of confidential information. *See* Gov't Code § 552.352 (providing penalties for improper release of confidential information).

Finally, we note that autopsy reports are expressly made public under section 11, article 49.25 of the Code of Criminal Procedure; therefore, an autopsy report may not be withheld from disclosure. *See* Open Records Decision No. 529 (1989). We assume that a copy of the responsive autopsy reports will be released to the requestor.

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,

A handwritten signature in cursive script that reads "Sam Haddad". The signature is written in black ink and is positioned above the typed name and title.

Sam Haddad
Assistant Attorney General
Open Records Division

SH/rho

Ref: ID# 106936

Enclosures: Submitted documents

cc: Ms. Adriana Salazar
210 S. Pedro
Mission, Texas 78572
(w/o enclosures)

