



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 12, 1997

Mr. Vernon M. Arrell
Commissioner
Texas Rehabilitation Commission
4900 North Lamar Blvd.
Austin, Texas 78751-2399

OR97-1797

Dear Mr. Arrell:

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# 107736.

The Texas Rehabilitation Commission (the "commission") received a request by an attorney representing a commission employee for various records related to the employee's application for a position within the agency, and to the employee's complaint based on the results of that application process. You assert that the information is excepted from disclosure pursuant to section 552.103 of the Government Code. We have considered your arguments and have reviewed the information submitted.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the governing body is or may be a party. The commission has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing 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. The commission must meet both prongs of this test for information to be excepted under section 552.103(a).

Litigation cannot be regarded as "reasonably anticipated" unless there is concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Open Records Decision Nos. 452 (1986), 331 (1982), 328 (1982). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision Nos. 452 (1986), 350 (1982). This office has concluded that litigation is reasonably anticipated when an attorney makes a written demand for disputed payments and promises further legal action if they

are not forthcoming, and when a requestor hires an attorney who threatens to sue a governmental entity. Open Records Decision Nos. 555 (1990), 551 (1990). However, the fact that an individual has hired an attorney or that a request for information was made by an attorney does not, without more, demonstrate that litigation is reasonably anticipated. Open Records Decision No. 361 (1983) at 2.

Upon review of the information submitted, we conclude that the commission has established that litigation is reasonably anticipated in this case, and that the requested information is related to that litigation. Therefore, the commission may withhold the requested information under section 552.103(a). However, we note that the requestor claims that certain information responsive to this request was originally sought by the employee on November 26, 1996, and that the information provided by the commission was not in the form requested. The requestor thus asserts that the commission has waived its right to assert exceptions for this category of information.¹ See Gov't. Code § 552.301 (providing that governmental body must ask the attorney general for decision as to whether requested documents must be disclosed not later than tenth day after date of receiving written request). If in fact the commission received the request for this information in November, 1996, and provided the requestor summaries in lieu of the actual information requested, then the commission has missed its ten-day deadline for seeking to withhold this information under section 552.103 and must release it to the requestor. Further, if in fact the commission did provide the requested information to the requestor, it may not now withhold the information under section 552.103(a). See Open Records Decision Nos. 349 (1982), 320 (1982) (when opposing party in litigation has seen or had access to any of information in requested records, there is no justification for withholding that information from requestor pursuant to section 552.103(a)). Finally, we note that many of the submitted records have either been provided to or received from the requestor, and thus may not be withheld from him. See Open Records Decision Nos. 349 (1982), 320 (1982).

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,



Michael A. Pearle
Assistant Attorney General
Open Records Division

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¹The requestor's letter states in pertinent part, "...my client also submitted a Public information request dated 11-26-96, asking for 'interview questions and answers for all five applicants interviewed and preliminary and final matrices and supporting notes, TRC 27A Register of Selection and justification for selection' in his request....The notes and supporting information, which would include tapes, if any, were requested originally by my client 11-26-96....The information Mr. Dement received had been edited and typed in a format to only summarize the interview questions and were not the original version of notes taken at interviews."

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Enclosures: Submitted documents

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(w/o enclosures)

