



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 22, 1997

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

OR97-2114

Dear Mr. Richards:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 109478.

The Texas Department of Health (the "department") received a request for

1. the license file, notice of violation file, and notification file of several companies;
2. a copy of the 1992 letter sent from the department to LAW regarding a potential conflict of interest;
3. any requests for open records made by any person regarding the several companies mentioned above; and
4. any records concerning the 1200 Travis, Houston, Texas Project, which may also be known as the Houston Police Department Renovation.

You claim that the information relating to American Resources, Inc., d/b/a Enviro Demolition, d/b/a Enviro-Demo, Inc. is excepted from public disclosure by section 552.103 of the Government Code. You have submitted no arguments or information as to the remainder of the request; therefore, we assume that you have released this information to the requestor. We have considered the exception you claim and reviewed the submitted information.

When asserting section 552.103, 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. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4.

Here, you submitted a letter from the United States Environmental Protection Agency ("EPA") which states that the EPA "has in process an open criminal investigation," and that release of the requested information "would have the potential of adversely affecting [the] pending criminal case." However, you have also submitted correspondence between the department and the EPA which shows that you have released information concerning the abatement project at 1200 Travis, Houston, Texas, in response to an open records request from the EPA. The information you have submitted to this office for our review also concerns the building located at 1200 Travis. The correspondence further shows that Continental Court Reporters, Inc. received records relating to American Resources, Inc. Because you have previously released the information to members of the public, you must now release the information to all members of the public who request it.

Section 552.007 prohibits a governmental body from selectively disclosing information that is not confidential by law but that a governmental body may withhold under an exception to section 552.021 of the Government Code. Section 552.007 provides as follows:

(a) This chapter does not prohibit a governmental body or its officer for public information from voluntarily making part or all of its information available to the public, unless the disclosure is expressly prohibited by law or the information is confidential under law.

(b) Public information made available under Subsection (a) must be made available to any person.

But see Open Records Decision No. 400 (1983) (prohibition against selective disclosure does not apply if governmental body releases confidential information to member of public).

Generally, information that is excepted from public disclosure under the act may be transferred between state agencies without destroying its confidential character, if the agency to which the information is transferred has the authority to obtain it. Open Records Decision

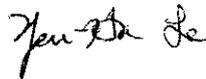
No. 650 (1996). However, the principle that information may be transferred without destroying its confidential character does not apply when the transfer of information is from a state agency to a federal agency. The policy supporting the interagency exchange of information is absent when a federal agency requests information that is not required by law to be disclosed to it since the state cannot effectively insure that the federal agency will maintain the confidentiality of the information. *See* Attorney General Opinion H-242 (1974) at 4. This office has concluded that the state may not release information made confidential by statute, unless some other law requires its disclosure. *See id.* Thus, because the act prohibits the selective disclosure of information to members of the public, the submitted information must be released.

We note, however, that the submitted information includes medical records. Section 552.101 excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Medical records or communications between a physician and patient are made confidential under the Medical Practice Act, V.T.C.S. art. 4495b, § 5.08 (b), (c), and may be disclosed only as permitted under section 5.08(b).

Lastly, the submitted information also contains information deemed confidential by the common-law right of privacy. Section 552.101 also encompasses common-law privacy and excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1. We have marked the information that you must withhold under section 552.101.

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 on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Yen-Ha Le
Assistant Attorney General
Open Records Division

Ref.: ID# 109478

Enclosures: Marked documents

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(w/o enclosures)