



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 24, 1997

Ms. Stacy E. Sallee
Associate Counsel
Texas Health and Human Services
Commission
P.O. Box 13247
Austin, Texas 78711

OR97-2154

Dear Ms. Sallee:

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# 109784.

The Texas Health and Human Services Commission (the "commission") received a request for the following categories of information relating to sanctions against dentists who have provided services under the Medicaid program:

1. All lists prepared by the Texas Health and Human Services Commission or Texas Department of Health of dentist Medicaid provider contracts terminated by the Texas Health and Human Services Commissions [sic] or Texas Department of Health.
2. All transmittal memoranda from the Texas State Board of Dental Examiners to the Texas Health and Human Services Commission or Texas Department of Health regarding copies of Dental Board orders provided to the Texas Health and Human Services Commission or Texas Department of Health.
3. All lists furnished to the Texas Health and Human Services Commission or Texas Department of Health by the Texas State Board of Dental Examiners regarding dentists subject to Dental Board orders.
4. All lists furnished to the Texas Health and Human Services Commission by the Texas Department of Health of dentist Medicaid provider contracts terminated by the Texas Department of Health.

5. All lists prepared by the Texas Health and Human Services Commission or Texas Department of Health of dentists who have been sanctioned by exclusion from participation in Title XIX or Title XX programs.
6. All lists furnished to the Texas Health and Human Services Commission by the Texas Department of Health of dentists who have been sanctioned by exclusion from participation in Title XIX or Title XX programs.

You assert that you do not have any information responsive to some of the requested information and that the remaining requested information is excepted from disclosure under section 552.103. We have considered your arguments and reviewed the information at issue.

First, you inform us that you do not have information responsive to items 1, 3, 4, and the requested information in item 5 which seeks all lists of sanctioned dentists created by the commission. The Open Records Act does not require a governmental body to make available information which does not exist at the time of the request. Open Records Decision No. 362 (1983). In addition, the Act does not require a governmental body to prepare new information or to obtain information not in its possession. Open Records Decision No. 558 (1990). Therefore, the commission need not comply with the request for information that did not exist at the time of the request.

Next, we address your section 552.103 claim as to the remaining requested information. Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. A governmental body 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. A governmental body must meet both prongs of this test for information to be excepted under 552.103(a). For purposes of section 552.103(a), this office considers a contested case under the Texas Administrative Procedure Act ("APA"), Government Code chapter 2001, to constitute "litigation." Open Records Decision No. 588 (1991) at 7 (construing statutory predecessor to the APA).

You advise us that the commission houses the Sanctions Division which "investigates and pursues administrative sanctions for overpayments and fraud perpetrated by providers in the Medicaid program." You state that the commission is the party bringing an action against an alleged violator of the Medicaid program. You further explain that because the commission does not have its own hearing process, the commission utilizes the Texas Department of Health's (the "department") hearing process and hearing examiners and that the attorney representing the state is also employed by the department. You inform us that these contested hearings are conducted pursuant to the Administrative Procedure Act as

provided by section 1.23 of Title 25 of the Texas Administrative Code. Finally, you state that the requestor's client is the subject of a pending action before the department, *In the Matter of Eldridge F. Dorsey, D.D.S.*, Docket No. D-010-1997-0002. We therefore conclude that you have established that the commission is a party to the pending litigation. Additionally, we conclude that the submitted information is related to the pending litigation. Thus, you may withhold the requested information under section 552.103.

Generally, however, 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. Further, 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).

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,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/rho

Ref.: ID# 109784

Enclosures: Submitted documents

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(w/o enclosures)

27

