



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

May 4, 1998

Ms. Linda Wiegman
Supervising Attorney
Office of General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR98-1117

Dear Ms. Wiegman:

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# 114420.

The Texas Department of Health (the "department") received two requests for information regarding two abortion facilities, New Women's Clinic and Reproductive Services and A to Z Women's Services, P.A. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the representative sample documents you have submitted.¹

Initially, we address your claim that section 552.103 excepts from disclosure all of the information regarding A to Z Women's Clinic. Section 552.103(a) excepts from disclosure information:

¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach and, therefore, does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(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.

In this instance, you explain that the department is currently involved in pending litigation, *Texas Department of Health v. A to Z Women's Services, Houston, et al.*, Cause No. 94-07517 (261st Judicial District Court, Travis County). You have provided this office with a copy of the petition in that case. After reviewing the submitted materials, we conclude that litigation is pending and that the requested information relates to the litigation. The department may, therefore, withhold most of the information regarding A to Z Women's Clinic under section 552.103, with the exceptions noted below.

In making this determination, we assume that the records have not been seen by the opposing party to the anticipated litigation. No section 552.103(a) interest generally exists with respect to information that all parties to the litigation have seen or had access to. Open Records Decision Nos. 349 (1982), 320 (1982). In addition, some of the information at issue here is made public by statute, as explained below. See Open Records Decision Nos. 623 (1994), 525 (1989) (Open Records Act's exceptions may not be used to withhold information deemed public under separate statute). Finally, the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).²

We now address the applicability of section 552.101 to the remaining information at issue. Section 552.101 excepts from disclosure information considered to be confidential by law, including statutory law. Abortion facilities are licensed pursuant to chapter 245 of the Health and Safety Code. Section 245.011(d) makes all information and records held by the department under chapter 245 confidential and not subject to the Open Records Act except under certain enumerated circumstances, which we find are not applicable here, and except as provided by section 245.017. The Seventy-fifth Legislature amended chapter 245 of the Health and Safety Code by adding section 245.017, which provides in pertinent part:

²We note that much of the information at issue contains information that is confidential by law. Should the requestor seek this information when section 552.103(a) is no longer applicable, we urge the department to exercise caution before releasing the information. See Gov't Code § 552.352 (providing penalties for improper release of confidential information).

(a) The department on request shall make the following information available to the public:

(1) the status of the license of any abortion facility;

(2) the date of the last inspection of the facility, any violation discovered during that inspection that would pose a health risk to a patient at the facility, any challenge raised by the facility to the allegation that there was a violation, and any corrective action that is acceptable to the department and that is being undertaken by the facility with respect to the violation; and

(3) an administrative or civil penalty imposed against the facility or a physician who provides services at the facility, professional discipline imposed against a physician who provides services at the facility, and any criminal conviction of the facility or a physician who provides services at the facility that is relevant to services provided at the facility.

....

(c) The department shall maintain a toll-free telephone number that a person may call to obtain the information described by Subsection (a).

You contend that the department is required to provide the information described under section 245.017(a) of the Health and Safety Code only through the toll-free telephone number and not upon written request. We disagree. We have reviewed your arguments and the legislative history of the amending bill.³ We conclude that section 245.017(c) mandates the maintenance of a toll-free telephone number by the department only as one means of providing to the public the information set forth in section 245.017(a). We do not find anything in the bill's legislative history bill to suggest that the toll-free telephone number shall be the exclusive vehicle through which an interested member of the public may access this information. The department must therefore withhold from public disclosure the remaining requested information under section 552.101 of the Government Code in conjunction with section 245.011(d) of the Health and Safety Code except as otherwise made public by section 245.017(a). The information concerning both clinics described by section 245.017(a) must be released to the requestors.

³See H.B. 2856, Acts 1997, 75th Leg., ch. 1120, § 4.

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,



Vickie Prehoditch
Assistant Attorney General
Open Records Division

VDP/alg

Ref.: ID# 114420

Enclosures: Submitted documents

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