



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 30, 1998

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

OR98-1568

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# 116380.

The Texas Health and Human Services Commission (the "commission") received a request for eleven categories of documents relating to various actions taken against providers in the Texas Medicaid program. You state that the commission is providing the requestor with documents responsive to categories 1 and 4 of his request. You inform us that the commission does not possess, and does not have a right of access to, documents responsive to categories 2-3 and 7-11 of the request. *See, e.g.*, Open Records Decision No. 534 (1989) (Open Records Act does not ordinarily require governmental body to obtain information not in its possession or create information in order to comply with open records request). Thus, the only documents at issue are those responsive to categories 5 and 6 of the request. You contend that these documents are excepted from disclosure pursuant to section 552.103 of the Government Code.¹ We have considered the exception you claim and have reviewed a representative sample of the documents at issue.²

Section 552.103(a) of the Government Code excepts from disclosure information relating to litigation to which a governmental body is or may be a party. The governmental body has the

¹Initially, you also raised sections 552.101, 552.107, 552.108, and 552.111 of the Government Code, but you have since withdrawn those claims.

²We 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.

burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body must show 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 contested case under the Administrative Procedure Act is litigation for purposes of section 552.103(a). Open Records Decision No. 588 (1991).

You have demonstrated that the commission reasonably anticipates litigation against Dr. Kent Dezelle, a Medicaid provider. You have also explained how the submitted documents relate to the reasonably anticipated litigation. 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 litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. The commission may withhold any remaining information from disclosure under section 552.103(a). Finally, we note that 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 any questions about this ruling, please contact our office.

Yours very truly,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/mjc

Ref: ID# 116380

Enclosures: Submitted documents

cc: Ms. Lonnie B. Davis
2314 Ann Arbor
Harlingen, Texas 78550
(w/o enclosures)