



December 15, 2000

Ms. Tina Plummer
Open Records Coordinator
Texas Department of Mental Health and Mental Retardation
P.O. Box 12668
Austin, Texas 78711-2668

OR2000-4715

Dear Ms. Plummer:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 142324.

The Texas Department of Mental Health and Mental Retardation (the "department") received a request from an attorney for the reimbursement file on a named individual, his client. You indicate that the department has released responsive information to the requestor. You have submitted for our review additional information that you indicate to be responsive to the request, marked by you as exhibits A and B. You assert that this information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.103 excepts from disclosure information:

relating to litigation of a civil or criminal nature 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.

[Information is excepted from disclosure] only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). Section 552.103 was intended to prevent the use of the Act as a method of avoiding the rules of discovery in litigation. Attorney General Opinion JM-1048 at 4 (1989). The litigation exception enables a governmental body to protect its position in litigation by requiring information related to the litigation to be obtained through discovery. Open Records Decision No. 551 at 3 (1990). To show that the litigation exception is applicable, the department must demonstrate that (1) litigation was pending or reasonably anticipated at the time of the request and (2) the information at issue is related to that litigation. *See* Gov't Code § 552.103(a), (c); *see also 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 at 4 (1990). You assert that litigation involving the department was reasonably anticipated at the time of the request. To demonstrate that litigation is reasonably anticipated, the department must furnish evidence that, at the time of the request, litigation was realistically contemplated and was more than mere conjecture. Gov't Code § 552.103(c); Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). This office has found that where a governmental body receives a demand letter from an attorney which threatens suit, litigation may be reasonably anticipated for purposes of section 552.103. Open Records Decision No. 346 at 2 (1982). This office has also found that the fact that a prospective plaintiff has hired an attorney who then makes a request under the Act is alone insufficient to trigger the protection of section 552.103. Open Records Decision No. 361 at 2 (1983). Thus, the mere fact that the requestor, an attorney, has requested information regarding his client is alone insufficient to demonstrate the applicability of section 552.103. However, you also represent to this office that the requestor:

had previously indicated that he believes his client . . . may be entitled to certain monies which had been used for payment for [his client's] support, maintenance, and treatment while at North Texas State Hospital. Further [the requestor] has indicated that he may be able to obtain the protected documents through discovery, which implies anticipated litigation.

Our review of the submitted exhibits also indicates that the requestor has made certain demands of the department, including payment of monies to his client. Under the totality of the circumstances, we believe in this instance that the department has demonstrated that litigation was reasonably anticipated at the time of the request. As to the second prong of the above-stated test, upon careful review of the submitted information, we also agree that the this information relates to the anticipated litigation. Except as otherwise noted herein, the department may therefore withhold the submitted information pursuant to section 552.103 of the Act.

Absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, 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, to

the extent the opposing parties in the anticipated litigation have seen or had access to any of the information responsive to the request, there is no justification for withholding that information from the requestor pursuant to section 552.103. Exhibit A contains draft copies of correspondence to the requestor. Exhibit B contains additional draft copies of correspondence to the requestor and communications concerning the drafts. We assume that neither the requestor nor his client have previously seen or been granted access to the information contained in exhibits A and B. We also note that the applicability of section 552.103 ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Because we are able to resolve the matter under section 552.103, we do not address the section 552.107 assertion. This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

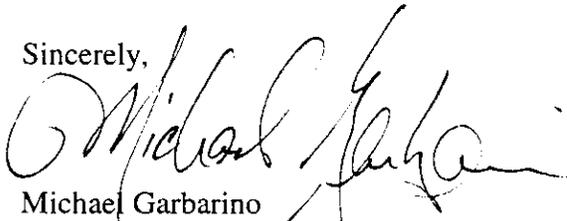
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael Garbarino
Assistant Attorney General
Open Records Division

MG/seg

Ref: ID#142324

Encl. Submitted documents

cc: Mr. Peter Hofer
7800 Shoal Creek Boulevard #142-5
Austin, Texas 78757-1024
(w/o enclosures)