Office of the Attorney General · State of Texas
John Cornyn

February 26, 2001

Mr. Craig H. Smith
Deputy General Counsel
Texas Workers' Compensation Commission
4000 South IH-35
Austin, Texas 78704-7491

OR2001-0712

Dear Mr. Smith:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 144404.

The Texas Workers' Compensation Commission ("TWCC") received a request for information relating to proposed changes in its procedures for resolving medical disputes. You claim that some of the requested information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the information you submitted. We also received and have reviewed the requestor's letter to this office dated December 26, 2000. *See* Gov't Code § 552.304 (permitting interested person to submit comments stating why requested information should or should not be released).

Initially, we address the requestor's written inquiry about the timeliness of TWCC's request for this attorney general decision. The requestor notes that TWCC asked for this decision by correspondence dated December 15, 2000. Section 552.301(b) of the Government Code provides that a governmental body which seeks to withhold requested information from the public "must ask for the attorney general's decision and state the exceptions that apply . . . not later than the 10th business day after the date of receiving the written request [for information]." Gov't Code § 552.301(b). The requestor believes that section 552.301(b) required TWCC to ask for this decision no later than December 14. Therefore, the requestor asks that this office "verify the actual date the TWCC letters were received by your office." We note that TWCC's further correspondence with this office, dated December 15, states as follows:

> Enclosed please find the originals of the requests for opinion faxed to you on December 14, 2000. Please note that the date on these documents is incorrectly noted as December 15, 2000. The date of these requests should be December 14, 2000.

Upon careful review, we agree that TWCC's letters apparently were dated in error. Our records reflect that this office received TWCC's written request for this decision on December 14, 2000. As the requestor correctly points out, December 14 was the tenth business day after the date on which TWCC advises us that it received the request for information. Therefore, we are satisfied that TWCC complied with section 552.301(b) in asking for this attorney general decision.

Next, we address TWCC's brief reference to section 552.103 of the Government Code, the "litigation exception." Section 552.103 provides in relevant part:

> (a) Information is excepted from [required public disclosure] if it is 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.
>
> . . . .
>
> (c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) 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). The governmental body that raises section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of the exception to the information that it seeks to withhold. To do so, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) that the information in question is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App. – Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. – Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

In this instance, TWCC asserts only that "because the 1996 medical Fee Guidelines are the subject of litigation, to a certain extent, the litigation exception . . . also applies." Thus, as you do not demonstrate that the requested information relates to any specific litigation that was pending or reasonably anticipated on the date of your receipt of the request for that information, TWCC may not withhold the information from the requestor under section 552.103. *See* Gov't Code § 552.103(c).

You also raise section 552.111 of the Government Code, which excepts from disclosure "an interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency." The purpose of section 552.111 is to protect advice,

opinion, and recommendation used in the decisional process from public disclosure and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App. -- San Antonio 1982, no writ); Open Records Decision No. 559 (1990). In Open Records Decision No. 615 (1993), this office reexamined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App. – Austin 1992, no writ). We concluded that section 552.111 protects "only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the deliberative or policymaking processes of the governmental body[.]" Open Records Decision No. 615 at 5-6; *see also City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, No. 03-00-00219-CV, 2001 WL 23169 (Tex. App. -- Austin 2001, no pet. h.).

In raising section 552.111, you assert that the release of the information at issue "would reveal the methods and processes used by TWCC in connection with its decision-making processes." You contend that "material . . . that is responsive to the requestor's broad requests is information that contains recommendations from the agency personnel and which thereby reflect [sic] the internal advice, opinions, and deliberations of TWCC." You claim that these documents "present opinions and conclusions of the type that TWCC believes is exempt from disclosure under [section] 552.111[.]"

We have considered your arguments. Upon careful review of the information in question, we have marked those parts of the information that we conclude are advice, opinions, and recommendations which are protected by section 552.111. TWCC may withhold that information. The rest of the information in question must be released. We note that TWCC has the discretion to release information that is excepted from disclosure under section 552.111. *See* Gov't Code § 552.007; Open Records Decision No. 470 at 7 (1987) (Public Information Act does not prohibit the release of information protected only by section 552.111).

In summary, the requested information is not excepted from disclosure under section 552.103 of the Government Code. TWCC may withhold parts of that information, however, under section 552.111.

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).

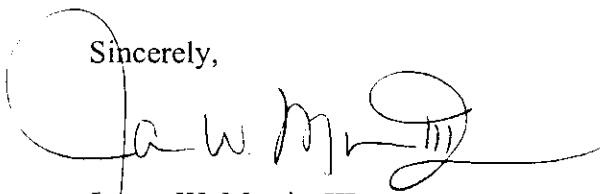
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/er

Ref: ID# 144404

Encl: Marked documents

cc: Mr. Ronald T. Luke, J.D., Ph.D
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(w/o enclosures)