



September 19, 2001

Mr. William T. Buida
Supervising Attorney
Texas Department of Human Services
P.O. Box 149030
Austin, Texas 78714-9030

OR2001-4192

Dear Mr. Buida:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 152157.

The Texas Department of Human Services (the "department") received a request for information relating to an adverse action taken against AL Investors Beaumont, LP, dba Dowlen Oaks. You claim that the responsive records include information that is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you raise and have reviewed the information you submitted.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception protects information that other statutes make confidential. You assert that some of the requested information is confidential under sections 12.003 and 21.012 of the Human Resources Code. Section 12.003 of the Human Resources Code provides in relevant part:

- (a) Except for purposes directly connected with the administration of the department's assistance programs, it is an offense for a person to solicit, disclose, receive, or make use of, or to authorize, knowingly permit, participate in, or acquiesce in the use of the names of, *or any information concerning*, persons applying for or receiving assistance if the information is directly or indirectly derived from the records, papers, files, or communications of the department or acquired by employees of the department in the performance of their official duties.

Hum. Res. Code § 12.003(a) (emphasis added). In Open Records Decision No. 584 (1991), this office concluded that “[t]he inclusion of the words ‘or any information’ juxtaposed with the prohibition on disclosure of the names of the department’s clients clearly expresses a legislative intent to encompass the broadest range of individual client information, and not merely the clients’ names and addresses.” *Id.* at 3. Consequently, it is the specific information pertaining to individual clients, and not merely the clients’ identities, that is made confidential under section 12.003. *See also* Hum. Res. Code § 21.012 (a) (requiring provision of safeguards that restrict use or disclosure of information concerning applicants for or recipients of assistance programs to purposes directly connected with administration of programs).

You indicate that the submitted information relates to the Community Based Alternatives program, which the department administers. You represent to this office that some of this information concerns applicants and recipients in this program. You further explain that Community Based Alternatives is a Medicaid program and that clients of the department in this program are Medicaid applicants or recipients. You assert that information relating to these individuals is confidential by law. You do not indicate that the requested release of this information would be for a purpose directly connected with the administration of a Medicaid program. Based on your representations and our review of the information in question, we agree that the information relating to Medicaid applicants or recipients is confidential under sections 12.003 and 21.012 of the Human Resources Code. Therefore, the information relating to Medicaid applicants or recipients that you have marked must be withheld under section 552.101 of the Government Code.

You claim that other responsive information is excepted from disclosure under section 552.103 of the Government Code. Section 552.103, the “litigation exception,” 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 bears the burden of providing relevant facts and documents sufficient to establish that this exception is applicable to the information at issue. 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 at issue 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 parts of the test must be met in order for information to be withheld under this exception. *Id.*

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, the governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.* Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission (“EEOC”), *see* Open Records Decision No. 336 (1982); (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

You inform this office that the requestor has requested a hearing conducted at the State Office of Administrative Hearings in accordance with chapter 2001, Government Code. You represent to this office that the information for which you claim an exception under section 552.103 relates to the subject of the requested hearing. This office has determined that a contested case under the Texas Administrative Procedure Act (the “APA”), chapter 2001 of the Government Code, constitutes “litigation” for purposes of section 552.103. *See* Open Records Decision No. 588 at 7 (1991) (construing statutory predecessor to APA). Therefore, based on your representations, we conclude that the information at issue under section 552.103 relates to litigation that the department reasonably anticipated on the date of its receipt of the request for this information. Therefore, the other information that you have marked for withholding under section 552.103 may be withheld from disclosure at this time.

In reaching this conclusion under section 552.103, we assume that the department does not seek to withhold any information that the opposing party to the anticipated litigation has seen or to which it has had access. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain it through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). If the opposing party to the litigation has seen or had access to information relating to the litigation, through discovery or otherwise, then there is no interest in withholding that information from public disclosure under section 552.103. *See* Open

Records Decision Nos. 349 (1982), 320 (1982). The applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. See Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, some of the requested information is confidential under sections 12.003 and 21.012 of the Human Resources Code and must be withheld from disclosure under section 552.101 of the Government Code. The other information for which you claim an exception under section 552.103 may be withheld from disclosure at this time. The remaining information must be released.

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).

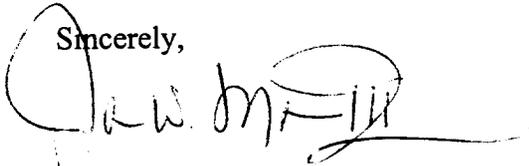
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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

A handwritten signature in black ink, appearing to read "J.W. Morris, III", with a long horizontal flourish extending to the right.

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

JWM/sdk

Ref: ID# 152157

Enc: Submitted documents

c: Mr. Michael R. Crowe
Hilgers & Watkins
P.O. Box 2063
Austin, Texas 78768
(w/o enclosures)