



September 19, 2001

Ms. Sara Shiplet Waitt  
Senior Associate Commissioner  
Texas Department of Insurance  
P.O. Box 149104  
Austin, Texas 78714-9104

OR2001-4203

Dear Ms. Waitt:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 152167.

The Texas Department of Insurance (the "department") received a request for "copies of any correspondence between [the department] and PacifiCare of Texas, any of its subsidiaries and its parent company" between January and June 2001. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note that Archie Clayton's affidavit was created on July 24, 2001, and submitted to demonstrate the department's section 552.103 claim. The affidavit is not responsive to the request. Thus, this decision does not address whether the department may withhold the affidavit.

Section 552.103(a) excepts from disclosure information relating to litigation to which a governmental body is or may be a party. The primary purpose of the litigation exception is to enable governmental bodies to protect their position in litigation by requiring parties seeking relevant information to obtain it, if at all, through "discovery" processes; and that purpose may survive a previous disclosure to be applicable in prospective litigation involving the same information. *Cornyn v. City of Garland*, 994 S.W.2d 258, 265 (Tex. App.--Austin 1999, no pet.). The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. To show

that section 552.103 is applicable, the governmental body must demonstrate that litigation is pending or reasonably anticipated at the time of the request, and that the information at issue is related to that litigation. *University of Tex. Law Sch, v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *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). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.* A contested case under the Administrative Procedure Act, chapter 2001 of the Government Code, constitutes litigation for the purposes of section 552.103. *See* Open Records Decision No. 588 at 7 (1991).

You state that the requested information relates to an ongoing investigation of PacifiCare of Texas, Inc. by the department's Legal and Compliance Division. You also state that the pending case file is subject to continued monitoring by the department and that litigation is therefore anticipated. Based on your representations and our review of the submitted information, we conclude that you have demonstrated that the submitted information relates to anticipated litigation involving the department for the purposes of section 552.103.

However, if the opposing party in the litigation has seen or had access to any of the information in submitted information, there is no section 552.103(a) interest in withholding that information from the requestor. Open Records Decision Nos. 349 (1982), 320 (1982). We note that all of the submitted documents were sent to or generated by PacifiCare of Texas, Inc. Because the opposing party has seen or had access to the requested information, the department may not withhold the documents under section 552.103 of the Government Code.

However, we note that some of the submitted documents are confidential by law under section 552.101 of the Government Code. The Office of the Attorney General will raise a mandatory exception like section 552.101 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Section 552.101 excepts from required public disclosure "information that is confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses confidentiality provisions such as those found in article 1.15 of the Insurance Code. Under that article, the department is required to visit each insurance carrier at least once every three years and examine its financial condition, ability to meet liabilities, and compliance with laws affecting the conduct of its business. Insurance Code art. 1.15, § 1; *see* Open Records Decision No. 640 (1996). In connection with this examination process, section 9 of article 1.15 provides:

- A final or preliminary examination report, and any information obtained during the course of an examination, is confidential and is not subject to disclosure under the open records law . . . . This section applies if the carrier

examined is under supervision or conservation but does not apply to an examination conducted in connection with a liquidation or a receivership under this code or another insurance law of this state.

After review of the submitted documents, we conclude that some of the documents were created under authority of section 9 of article 1.15 of the Insurance Code. We have marked the documents that the department must withhold under section 552.101 in conjunction with section 9 of article 1.15 of the Insurance Code. The rest of the documents 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,



Yen-Ha Le  
Assistant Attorney General  
Open Records Division

YHL/DKB/seg

Ref: ID# 152167

Enc. Marked documents

c: Ms. Theresa B. Devine, Director  
Health Care Financing Department  
Texas Medical Association  
401 West 15<sup>th</sup> Street  
Austin, Texas 78701  
(w/o enclosures)