



ATTORNEY GENERAL OF TEXAS  
G R E G A B B O T T

January 25, 2006

Ms. Margaret A. Roll  
Interim Open Records Attorney  
Texas Department of Aging and Disability Services  
P.O. Box 149030  
Austin, Texas 78714-9030

OR2006-00849

Dear Ms. Roll:

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# 240830.

The Texas Department of Aging and Disability Services (the "department") received a request for the Compliance Review and Administrative Review of Amistad Personal Assistance Services ("Amistad"). You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and reviewed the submitted information, portions of which consist of representative samples.<sup>2</sup>

Initially, we note that a portion of the submitted information was created after the department received this request. Because the department did not maintain this information at the time it received this request, the information is not encompassed by the request, and we do not address it in this ruling. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, *writ dismiss'd*); Open Records Decision No. 452 at 3

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<sup>1</sup>Although you initially raised section 552.111, you have not submitted arguments explaining how this exception applies to the submitted information. Therefore, we presume you have withdrawn this exception. *See Gov't Code §§ 552.301, 552.302.*

<sup>2</sup>We 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.

(1986) (governmental body not required to disclose information that did not exist at the time request was received).

Next, we note that portions of the submitted information are subject to section 552.022 of the Government Code. Section 552.022 provides in part that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1), (3). In this instance, portions of the submitted information consist of completed reports or investigations made of, for, or by the department. That information, which we have marked, comes within the scope of section 552.022(a)(1) and must be released unless it is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. We also have marked information that comes within the scope of section 552.022(a)(3). That information must be released unless it is expressly confidential under other law. You seek to withhold the information that is subject to section 552.022 under section 552.103. We note, however, that section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); 665 at 2 n.5 (2000) (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to Gov't Code § 552.103 subject to waiver). As such, section 552.103 is not other law that makes information confidential for purposes of section 552.022. Thus, you may not withhold any of the submitted information that is subject to section 552.022 under section 552.103. Because section 552.101 is "other law" for purposes of section 552.022, we will discuss your arguments under this exception for the information at issue.

However we will first address your arguments for the submitted information that is not subject to section 552.022. Section 552.103 of the Government Code 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). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. 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). For purposes of section 552.103(a), this office considers a contested case under the Texas Administrative Procedure Act ("APA"), Government Code chapter 2001, to constitute "litigation." Open Records Decision No. 588 at 7 (1991). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). When the governmental body is the prospective plaintiff in litigation, the evidence of anticipated litigation must at least reflect that litigation involving a specific matter is "realistically contemplated." See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (investigatory file may be withheld if governmental body's attorney determines that it should be withheld pursuant to Gov't Code § 552.103 and that litigation is "reasonably likely to result").

You state that "[t]he department currently has one pending and one anticipated recoupment action against [the requestor] and Amistad." You further state that "[a]s a direct result of the compliance review and the administrative review, the department identified several overpayments to Amistad based on the lack of valid practitioner's statements." You inform us that the Amistad has appealed the department's request for the return of its funds and that "the appeal is a contested case under the Administrative Procedures Act." Based on the information you have provided, we conclude that you have shown that litigation was pending and additional litigation was reasonably anticipated when the department received this request. In addition, based on your representations and our review of the remaining

submitted information, we agree that this information is related to the pending and anticipated litigation for purposes of section 552.103(a). Thus, you have demonstrated the applicability of section 552.103.

However, once information has been obtained by all parties to the litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). Some of the submitted documents reflect on their faces that they were obtained from or provided to the only opposing party in the pending and anticipated litigation. These documents may not be withheld under section 552.103. Therefore, the information at issue that has not been provided to or received from the only opposing party in the pending and anticipated litigation may be withheld under section 552.103.<sup>3</sup>

We turn now to the remaining submitted information. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information protected by other statutes. We note that sections 12.003 and 21.012 of the Human Resources Code prohibit the disclosure of information concerning clients of a state plan for assistance, except for a purpose directly connected with the administration of the plan. *See* Hum. Res. Code §§ 12.003, 21.012; *see also* 40 T.A.C. § 71.4 (information may be released if for purposes reasonably necessary for administering assistance program); Open Records Decision Nos. 584 (1991), 166 (1977). Section 12.003 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). The term “assistance” in sections 12.003 and 21.012 of the Human Resources Code includes “all forms of assistance and services for needy persons authorized by Subtitle C.” *Id.* § 11.001(4); *see also id.* § 31.001 *et seq.* (subtitle C, pertaining to assistance programs).

In Open Records Decision No. 584 (1991), this office determined 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

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<sup>3</sup>As our ruling under section 552.103 is dispositive, we do not address your argument under section 552.107.

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).

Upon review, we agree that portions of the remaining information contain Medicaid recipient identifying information. We find that the release of such information in this instance is not a release for purposes directly connected with the administration of the Medicaid program. See 40 T.A.C. §§ 71.4, 71.11-71.14; *see also* 42 C.F.R. § 431.302 (setting forth purposes directly related to state Medicaid and Medicare administration). Accordingly, we conclude that the department must withhold the information that you have marked, as well as the additional information that we have marked pursuant to section 552.101 of the Government Code in conjunction with section 12.003 of the Human Resources Code.<sup>4</sup>

In summary, to the extent the submitted information is not subject to section 552.022 of the Government Code and has not been received from or provided to the opposing party in the pending and anticipated litigation, it may be withheld under section 552.103 of the Government Code. The information that identifies Medicaid recipients must be withheld under section 552.101 of the Government Code in conjunction with section 12.003 of the Human Resource Code. The remaining submitted information must be released to the requestor.

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, upon receiving this ruling, the governmental body

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<sup>4</sup>Because we find our ruling under section 552.101 in conjunction with section 12.003 of the Human Resource Code dispositive, we do not address your arguments under section 159.002(b) and (c) of the Occupations Code.

will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Dep't of Pub. 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 Office of the Attorney General 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,



L. Joseph James  
Assistant Attorney General  
Open Records Division

LJJ/segh

Ref: ID# 240830

Enc. Submitted documents

c: Ms. Sonia Gonzalez  
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(w/o enclosures)