



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 15, 2007

Mr. James Downes
Assistant County Attorney
Harris County
2525 Holly Hall, Suite 190
Houston, Texas 77054

OR2007-07567

Dear Mr. Downes:

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 #280108.

The Harris County Hospital District (the "district") received a request for an audit report or any other document that "spells out the feds' position on the wrongful billing for Medicare and Medicaid from 2000-2005." You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.107(2) of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

We note that Exhibit B has been filed with the United States District Court for the Southern District of Texas. A document that has been filed with a court is expressly public under section 552.022 of the Government Code and may not be withheld unless it is confidential under other law. *See* Gov't Code § 552.022(a)(17). Although the district asserts that a court has ordered this information not be disclosed, section 552.022(b) provides the following:

A court in this state may not order a governmental body or an officer for public information to withhold from public inspection any category of public information described by Subsection (a) or to not produce the category of

¹Although you raise section 552.101 in conjunction with the court order, we note that the proper exception to raise in this instance is section 552.107(2) of the Government Code. Gov't Code § 552.107(2). Accordingly, we will consider your argument under this section.

public information for inspection or duplication, unless the category of information is expressly made confidential under other law.

Id. § 552.022(b). Thus, because section 552.022(b) prohibits a court from ordering the withholding of documents subject to section 552.022(a)(17), we conclude the district may not withhold Exhibit B pursuant to the court order at issue. Additionally, the district raises section 552.103 for this information. Section 552.103 is a discretionary exception within chapter 552 of the Government Code and not other law that makes information confidential. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d469, 475-76 (Tex. App.--Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 665 at 2 n. 5 (2000) (discretionary exceptions generally); 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived). Therefore, Exhibit B may not be withheld under section 552.103. As you raise no further exceptions against the disclosure of Exhibit B, it must be released.

We now address your arguments regarding the information not subject to section 552.022(a)(17). The district contends section 552.107(2) also excepts Exhibit C from public disclosure. Section 552.107(2) provides information is excepted from disclosure if “a court by order has prohibited disclosure of the information.” Gov’t Code § 552.107(2). The district has provided our office with a copy of an agreed order from civil action H-03-4438, which is before the United States District Court for the Southern District of Texas. The order provides, “[t]he relator’s first amended complaint shall be unsealed. All other pleadings and documents in the Court’s file in this action shall remain under seal and not be made public or served upon the relator or the defendant.” As you acknowledge, Exhibit C consists of a letter regarding settlement negotiations between the two parties. You have not explained, nor is it clear from the face of the documents themselves, that this information constitutes part of the court’s file. Therefore, the district may not withhold Exhibit C under section 552.107(2) on the basis of the order.

The district also raises section 552.103 of the Government Code for Exhibit C, which provides in relevant part as follows:

(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 district 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 is pending or reasonably anticipated, 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). The district must meet both prongs of this test for information to be excepted under section 552.103(a).

You state and provide documentation showing that a civil action was filed in the United States District Court for the Southern District of Texas prior to the district's receipt of the current request for information. Therefore, we agree that the district was involved in pending litigation on the date it received the records request. We further find the information at issue relates to this pending litigation.

We note, however, that all of the parties in the matter at issue have had prior access to the submitted information. 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 that litigation to obtain it through discovery procedures. See ORD No. 551. Once information has been obtained by all parties to the litigation 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, information that has either been obtained from or provided to the opposing party in the pending litigation is not excepted from disclosure under section 552.103(a). Consequently, because the information has been seen by all parties, there would be no justification for now withholding such information pursuant to section 552.103, and none of it may be withheld on that basis.

In summary, the district must release Exhibit B pursuant to section 552.022(a)(17) of the Government Code. Because the district does not assert any further exceptions against the disclosure of Exhibit C, it must also 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, upon receiving this ruling, the governmental body 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,



Reg Hargrove
Assistant Attorney General
Open Records Division

RJH/jb

Ref: ID# 280108

Enc. Submitted documents

c: Mr. Bill Murphy
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(w/o enclosures)