



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 1, 2010

Mr. Michael Garbarino
Director, Policy and Outreach
Officer of Inspector General
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

OR2010-09730

Dear Mr. Garbarino:

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# 385092 (HHSC# OR-20100423-0587).

The Texas Health and Human Services Commission (the "commission") received a request for five categories of information regarding prepayment review, nine categories of information regarding the surveillance and utilization review program, and any information relating to a named doctor.¹ You state you have released or will release some information to the requestor. You state you will withhold some information pursuant to previous determinations issued to the commission in Open Records Letter Nos. 2004-8876 (2004) and 2004-8357 (2004), previous determinations authorizing the commission to withhold information and materials compiled by the OIG in connection with its investigations under section 531.1021(g) of the Government Code, without the necessity of requesting an attorney general decision. You claim portions of the submitted information are excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, and 552.111 of the Government Code.² Although you take no position with respect to the public availability of

¹The requestor seeks information from agencies the commission oversees, including the Texas Health and Human Services Office of the Inspector General ("OIG"), the Department of Aging and Disability Services, and the Department of State Health Services, and from third-party contractors that perform administrative and billing functions for the state Medicaid program.

²You state you withdraw your assertion of section 552.104 of the Government Code.

the remaining information, you state release of this information may implicate the proprietary interests of a third party. You inform us, and provide documentation showing, that pursuant to section 552.305 of the Government Code, the commission has notified ACS State Healthcare, L.L.C. ("ACS") of the request and of its right to submit arguments to this office explaining why the submitted information should not be released. *See Gov't Code § 552.305* (permitting interested third party to submit to attorney general reasons why requested information should not be released); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information, a portion of which consists of a representative sample.³

Initially, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why requested information relating to that party should be withheld from disclosure. *See Gov't Code § 552.305(d)(2)(B)*. As of the date of this letter, ACS has not submitted any comments to this office explaining how release of Attachment B-4 or Attachment C would affect its proprietary interests. Accordingly, none of the information at issue may be withheld on that basis. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (stating business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret). As the commission makes no arguments regarding this information, Attachment B-4 and Attachment C must be released to the requestor.

Next, we note a portion of the remaining information is subject to section 552.022 of the Government Code, which provides in relevant part:

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

...

(2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body; [and]

...

³We assume 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.

(15) information regarded as open to the public under an agency's policies[.]

Gov't Code § 552.022(a)(2), (15). Portions of Attachment B-1 consist of names and titles of commission employees, which are subject to section 552.022(a)(2), and job postings and job descriptions, which are subject to section 552.022(a)(15). Because you inform us the commission has released separate pieces of this information to the public, we find the submitted job postings and job descriptions are regarded as open to the public under the commission's policies and are therefore subject to section 552.022(a)(15). The commission must release this information, which we have marked, unless it is expressly confidential under other law. Although you raise section 552.103 of the Government Code as an exception against disclosure of the information subject to section 552.022, this 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 section 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). As such, section 552.103 is not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the commission may not withhold the information subject to section 552.022 under section 552.103. However, we will address your claim under this exception for the information in Attachment B-1 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 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

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). 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 section 552.103 and that litigation is "reasonably likely to result").

You assert the commission reasonably anticipates litigation. In a separate brief to this office, which you state is confidential under section 531.1021(g) of the Government Code, you provide information relevant to your claim under section 552.103. In your non-confidential arguments, you explain the circumstances and facts surrounding the submitted information cause the OIG to possess a good-faith belief a substantial chance of litigation exists. Based on your representations and our review of the submitted information, we conclude the commission reasonably anticipated litigation prior to the date of the request for information. Furthermore, we find the information not subject to section 552.022 in Attachment B-1 relates to the anticipated litigation for purposes of section 552.103(a). Accordingly, the commission may withhold the information not subject to section 552.022, which we have marked, in Attachment B-1 under section 552.103 of the Government Code.

Generally, however, 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 anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Section 552.108(a)(1) of the Government Code excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime[.]" Gov't Code § 552.108(a)(1). An agency whose function is essentially regulatory in nature is not a "law enforcement agency" for purposes of section 552.108. *See* Open Records Decision No. 199 (1978) (construing predecessor statute). However, a non-law-enforcement agency may withhold information under section 552.108 if the information relates to possible criminal conduct and has been or will be forwarded to an appropriate law enforcement agency for investigation. *See* Attorney General Opinion MW-575 (1982), Open Records Decision No. 493 (1988); *see also* Open Records Decision No. 372 (1983) (where incident involving allegedly criminal conduct is still under active investigation or prosecution, law enforcement exception may be invoked

by any proper custodian of information which relates to incident). A governmental body that claims information is excepted from disclosure under section 552.108 must reasonably explain how and why section 552.108 is applicable to the information. See Gov't Code §§ 552.108(a)(1), .301(e)(1)(A); see also *Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977); Open Records Decision No. 434 at 2-3 (1986).

Section 552.108(b)(1) excepts from disclosure the internal records and notations of law enforcement agencies and prosecutors when their release would interfere with law enforcement and crime prevention. Gov't Code § 552.108(b)(1); see also Open Records Decision No. 531 at 2 (1989) (quoting *Ex parte Pruitt*, 551 S.W.2d 710). Section 552.108(b)(1) is intended to protect "information which, if released, would permit private citizens to anticipate weaknesses in a police department, avoid detection, jeopardize officer safety, and generally undermine police efforts to effectuate the laws of this State." *City of Fort Worth v. Cornyn*, S.W.3d 320 (Tex. App.—Austin 2002, no pet.). To demonstrate the applicability of this exception, a governmental body must meet its burden of explaining how and why release of the requested information would interfere with law enforcement and crime prevention. Open Records Decision No. 562 at 10 (1990). This office has concluded section 552.108(b) excepts from public disclosure information relating to the security or operation of a law enforcement agency. See, e.g., Open Records Decision Nos. 531 (release of detailed use of force guidelines would unduly interfere with law enforcement), 252 (1980) (Gov't Code § 552.108 is designed to protect investigative techniques and procedures used in law enforcement), 143 (1976) (disclosure of specific operations or specialized equipment directly related to investigation or detection of crime may be excepted). Section 552.108(b)(1) is not applicable, however, to generally known policies and procedures. See, e.g., ORD 531 at 2-3 (Penal Code provisions, common law rules, and constitutional limitations on use of force not protected), 252 at 3 (governmental body failed to indicate why investigative procedures and techniques requested were any different from those commonly known).

You state the remaining information pertains to an ongoing investigation by the Medicaid Program Integrity ("MPI") unit of the OIG regarding possible violations of Medicaid regulations. You have informed this office the commission is required to cooperate with the Medicaid Fraud Control Unit ("MFCU") of the Office of the Attorney General and other law enforcement agencies in appropriate cases. You indicate MPI could refer this investigation to MFCU depending on the results of MPI's investigation. Based on your representations and our review, we conclude the commission may withhold Attachment B-3 pursuant to section 552.108(a)(1) of the Government Code. See *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177, 186-87 (Tex. Civ. App.—Houston [14th Dist.] 1975), writ *ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). You further state release of details of the prepayment review or surveillance and utilization review systems "would allow providers to adjust their billing patterns to . . . avoid[] detection of any improper, if not illegal, Medicaid billings . . . and seriously interfere with the OIG's efforts to investigate and enforce Medicaid fraud, waste, and abuse." We therefore conclude the commission may withhold

Attachment B-2 under section 552.108(b)(1) of the Government Code. As our ruling is dispositive, we need not address your remaining arguments against disclosure.

In summary, the commission may withhold the information we have marked in Attachment B-1 under section 552.103 of the Government Code. The commission may withhold Attachment B-3 under section 552.108(a)(1) of the Government Code and Attachment B-2 under section 552.108(b)(1) of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Mack T. Harrison
Assistant Attorney General
Open Records Division

MTH/sdk

Ref: ID# 385092

Enc. Submitted documents

c: Requestor
(w/o enclosures)