



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 31, 2011

Mr. Carey E. Smith
General Counsel
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

OR2011-12578

Dear Mr. Smith:

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# 428450.

The Health and Human Services Commission (the "commission") received a request for (1) the number of individuals enrolled in the Star+Plus waiver program that are classified as "high needs" and are receiving general revenue funds to cover service costs in excess of the program's individual cost limit; (2) confirmation or denial that the general revenue funding noted in part (1) of the request is appropriated by specified legislation ("Rider 36"); and (3) if the response to part (2) of the request is a denial, the source of the general revenue funding noted in part (1) of the request. You claim the submitted program enrollee 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. We have also received and considered comments submitted by the requestor. *See Gov't Code* § 552.304 (interested party may submit written comments regarding availability of requested information).

Initially, you assert parts (2) and (3) of the request are not requests for information, but, rather, seek responses to legal interrogatories. The Act does not require a governmental body to answer factual questions, conduct legal research, or create new information in responding to a request for information. *See Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990)*. Furthermore, the Act does not require a governmental body to make available information that did not exist when the request was received, nor does it require a governmental body to compile information or prepare new information. *See Economic Opportunities Dev. Corp. v. Bustamante, 562 S.W.2d 266 (Tex. Civ.*

App.—San Antonio 1978, writ *dism'd*); Open Records Decision No. 452 at 3 (1986). However, a governmental body must make a good-faith effort to relate a request to information that is within its possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). In this instance, we find parts (2) and (3) of the request are requests for information, not simply questions seeking answers. You have not submitted any information responsive to parts (2) and (3) of the request. Thus, to the extent information responsive to these aspects of the request existed on the date the commission received the request, the commission must release that information. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, the requestor generally asserts the requested information is subject to section 552.022 of the Government Code. The requestor claims the following provisions of section 552.022 apply:

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

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

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate; [and]

...

(8) a statement of the general course and method by which an agency's functions are channeled and determined, including the nature and requirements of all formal and informal policies and procedures[.]

Gov't Code § 552.022(a)(3), (5), (8). The submitted information pertains to the number of certain individuals in a particular Medicaid program, not the types of information specified in sections 552.022(a)(3), 552.022(a)(5), and 552.022(a)(8). Upon review, we find sections 552.022(a)(3), 552.022(a)(5), and 552.022(a)(8) do not apply to the submitted information. Thus, we will consider the remaining submitted arguments.

You assert the submitted information is excepted from disclosure under section 552.103 of the Government Code, which provides:

(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.

Id. § 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 (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).

You state, and provide documentation showing, the commission received the request for information after two lawsuits styled *James East b/n/f Cynthia Gonzales v. Chris Traylor, et al.*, Civil Action No. 1:10-cv-775 LY, and *Landon David Parker b/n/f John and Cristin Parker v. Chris Traylor, et al.*, Civil Action No. 1:11-cv-12, were filed by the requestor against the commission in the United States District Court for the Western District of Texas, Austin Division. Based on your representation and our review, we conclude litigation involving the commission was pending when the commission received the request. You also state the submitted information is related to the pending litigation because it pertains to the issues that help form the bases of the lawsuits, which allege the commission wrongfully denied services and funding to the individuals at issue under the Star+Plus waiver program, a similar waiver program, and Rider 36. Based on your representations and our review, we find the submitted information is related to the pending litigation for purposes of section 552.103. Therefore, we conclude section 552.103 of the Government Code is applicable to the submitted information.

The requestor, however, is a representative of Disability Rights Texas ("DRT"), formerly known as Advocacy, Inc., which has been designated as the state's protection and advocacy system ("P&A system") for purposes of the Developmental Disabilities Assistance and Bill of Rights Act ("DDA Act"), 42 U.S.C. §§ 15041-15045. *See* Tex. Gov. Exec. Order No. DB-33, 2 Tex. Reg. 3713 (1977); Attorney General Opinion JC-0461 (2002); see also 42 C.F.R. §§ 51.2 (defining "designated official" and requiring official to designate agency to be accountable for funds of P&A agency), .22 (requiring P&A agency to have a governing authority responsible for control). The requestor asserts a right of access to the submitted information under the DDA Act, specifically section 15043(a)(2), which provides, in part, a P&A system shall

(A) have the authority to--

(i) pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of, and advocacy for, the rights of [individuals with developmental disabilities] within the State who are or who may be eligible for treatment, services, or habilitation, or who are being considered for a change in living arrangements, with particular attention to members of ethnic or racial minority groups; and

...

(I) have access to all records of--

(i) any individual with a developmental disability who is a client of the system if such individual, or the legal guardian, conservator, or other legal representative of such individual, has authorized the system to have such access;

(ii) any individual with a developmental disability, in a situation in which--

(I) the individual, by reason of such individual's mental or physical condition, is unable to authorize the system to have such access;

(II) the individual does not have a legal guardian, conservator, or other legal representative, or the legal guardian of the individual is the State; and

(III) a complaint has been received by the system about the individual with regard to the status or treatment of the

individual or, as a result of monitoring or other activities, there is probable cause to believe that such individual has been subject to abuse or neglect; and

(iii) any individual with a developmental disability, in a situation in which--

(I) the individual has a legal guardian, conservator, or other legal representative;

(II) a complaint has been received by the system about the individual with regard to the status or treatment of the individual or, as a result of monitoring or other activities, there is probable cause to believe that such individual has been subject to abuse or neglect;

(III) such representative has been contacted by such system, upon receipt of the name and address of such representative;

(IV) such system has offered assistance to such representative to resolve the situation; and

(V) such representative has failed or refused to act on behalf of the individual[.]

42 U.S.C. § 15043(a)(2)(A), (I)(i)-(iii). The DDA Act states the term "record" includes

(1) a report prepared or received by any staff at any location at which services, supports, or other assistance is provided to individuals with developmental disabilities;

(2) a report prepared by an agency or staff person charged with investigating reports of incidents of abuse or neglect, injury, or death occurring at such location, that describes such incidents and the steps taken to investigate such incidents; and

(3) a discharge planning record.

Id. § 15043(c). Although the requestor generally asserts in his request for information he has a right of access under section 15043(a)(2), he has not explained, either in his request or his comments submitted to this office, how 15043(a)(2) provides him with a right of access to the submitted information. Upon review, we conclude DRT has failed to demonstrate the applicability of section 15043(a)(2) of title 42 of the United States Code to the submitted

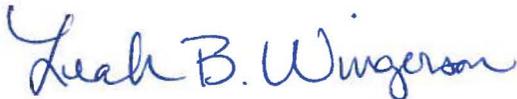
information. Consequently, DRT does not have a right of access to the submitted information and the commission may withhold the information under section 552.103 of the Government Code.

We note, 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 litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/dls

Ref: ID# 428450

Enc. Submitted documents

c: Requestor
(w/o enclosures)