



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 18, 2012

Ms. Lisa D. Hernandez
General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2012-07456

Dear Ms. Hernandez:

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# 454220 (DSHS File: 20058/2012).

The Texas Department of State Health Services (the "department") received a request for correspondence between the department and the Office of the Governor or other elected officials regarding the Women's Health Program ("WHP"), family planning, and Planned Parenthood during a specified period of time. You state that all "releasable information has been or will be made available to the requestor." You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code. We have also received comments from the Office of the Attorney General (the "OAG"). *See* Gov't Code § 552.304 (providing that any person may submit comments stating why information should or should not be released). We have considered the submitted arguments and reviewed the submitted representative sample of information.¹

¹We 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 those records contain substantially different types of information than that submitted to this office.

Section 552.103 of the Government Code 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.

Gov't Code § 552.103(a), (c). The 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 is 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). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated for purposes of section 552.103, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). When the governmental body is the prospective plaintiff or prosecutor in the anticipated litigation, the concrete evidence must at least reflect that litigation is “realistically contemplated.” See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (finding that investigatory file may be withheld if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is “reasonably likely to result”). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986).

You and the OAG claim the submitted information is excepted from disclosure under section 552.103 because litigation relating to the subject of the instant request was reasonably anticipated at the time the department received the request. The OAG explains that prior to the date of the instant request, the Texas Health and Human Services Commission (the “HHSC”) requested a continuation of a Medicaid eligibility waiver from the federal Centers for Medicare and Medicaid Services (the “CMS”), which is overseen by the United States

Department of Health and Human Services (“USHHS”), on behalf of the State of Texas to receive federal funds for the WHP. The OAG states the CMS issued a letter to the HHSC denying the waiver request on December 12, 2011. The OAG states that as a result of this denial, the OAG, in coordination with the department and other state agencies, began working towards filing litigation against USHHS. Thus, we find litigation was reasonably anticipated on the date the department received the instant request. Further, you, and the OAG, explain the information at issue is related to the anticipated litigation. Based on these representations and our review, we find the submitted information is related to the anticipated litigation for purposes of section 552.103 of the Government Code. Accordingly, the department may withhold the submitted information under section 552.103 of the Government Code. As our ruling is dispositive, we need not address your remaining arguments against disclosure.

We note, however, once the information at issue 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. *See* Open Records Decision Nos. 349 (1982), 320 (1982). 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,



Jeffrey W. Giles
Assistant Attorney General
Open Records Division

JWG/dls

Ref: ID# 454220

Enc. Submitted documents

c: Requestor
(w/o enclosures)

Mr. Reg Hargrove
Assistant Attorney General
Public Information Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548
(w/o enclosures)