



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 29, 1995

Mr. Vernon M. Arrell
Commissioner
Texas Rehabilitation Commission
Central Office
4900 North Lamar Blvd.
Austin, Texas 78751-2399

OR95-1304

Dear Mr. Arrell:

You have asked whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 36325.

The Texas Rehabilitation Commission (the "commission") received a request for information relating to the commission's file on the Panhandle Action Center for Independent Living Skills ("PACILS"). You indicate that PACILS provides services to disabled individuals to enhance their ability to live independently. Financial assistance is provided to PACILS by the state and federal government through annual grants. The commission is the state agency responsible for administering these annual grants. You assert that the information requested about the PACILS file is excepted from disclosure pursuant to sections 552.101, 552.103, 552.104,¹ 552.107, and 552.108.

You assert that some of the information at issue is excepted from disclosure on the basis of common-law privacy under section 552.101. The information at issue includes documents that you state may be embarrassing to the PACILS executive director, release of which she may consider damaging to her reputation. Information is

¹We assume that you are asserting section 552.104. You assert that section 552.021 is applicable, but argue that the information is related to competition or bidding situations, which are interests protected under section 552.104. Section 552.021 provides that public information is available during an agency's normal business hours.

protected by common-law privacy if it would be highly intimate or embarrassing to a reasonable person *and* the information is of no legitimate public concern. *Industrial Found. of the So. v. Texas Indus. Accident Bd.*, 540 S.W. 2d 668, 682 (Tex. 1976), *cert. denied*, 430 U.S. 93 (1977); Open Records Decision No. 328 (1982) at 2-3. Even if some of the information at issue is embarrassing, as it concerns the use of public funds and information about a publicly funded program, this information is of legitimate public concern.

You appear to argue that there may be a false-light invasion of privacy interest in the information at issue. We note that false light privacy is not a proper consideration under the Open Records Act. Open Records Decision No. 579 (1990) at 7 (purpose of Open Records Act best served by releasing even uncertain information when it relates to public's business); *see also Cain v. Hearst Corp.*, 878 S.W.2d 577 (Tex. 1994) (state of Texas does not recognize tort of false-light invasion of privacy).

Section 552.104 is designed to protect governmental interests in commercial transactions. Open Records Decision No. 593 (1991) at 2. Generally, section 552.104 protects a governmental body's interests in relation to a specific competitive situation in which third parties are bidding to contract with the government. Open Records Decision No. 592 (1991) at 4. Although you state the commission plans to solicit requests for proposals for independent living centers in the Amarillo area at some point in the near future, you have not demonstrated that there is currently a competitive situation with third party bids. Further, it is not apparent, nor have you explained, how release of the information at issue would have an impact on future requests for proposals.

Section 552.107(1) excepts from disclosure only those communications that reveal client confidences or the attorney's legal opinion or advice. Open Records Decision Nos. 589 (1991) at 1, 574 (1990) at 3, 462 (1987) at 9-11. We assume that you are asserting this argument for the folder marked "Legal Matters." The documents in this folder may be withheld from public disclosure pursuant to section 552.107(1)

You claim that section 552.108 protects from disclosure "working documents" connected with an audit until that audit is completed. You rely upon *A & T Consultants v. Sharp*, 904 S.W.2d 688 (Tex. 1995), but do not explain how section 552.108 is applicable to any of the documents at issue.² Since you have not explained how section 552.108 is applicable in this situation, you may not withhold these documents under section 552.108.

²We note that it appears that the audit has been completed. You state that the audit is not complete until the exceptions are resolved at an administrative hearing or otherwise, but it is not apparent to this office that audits are incomplete until all complaints or concerns have been administratively resolved.

We also note that you did not mark the submitted documents to show which portions you claimed were excepted under section 552.108. *See* Open Records Decision No. 419 (1984) at 3.

To show that section 552.103(a) is applicable, a governmental entity must show that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to the litigation. *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 (1990) at 4. The governmental entity must meet both prongs of this test for information to be excepted under section 552.103.

You appear to be asserting a reasonable anticipation of litigation because of concern that that the commission will be sued by either the executive director of PACILS, the PACILS board, or both. You explain that the executive director has sued several directors for, among other things, defamation and interference with contractual relations. You state that you are concerned that the executive director may also sue the commission, though it does not appear that the executive director has threatened to sue the commission.

The commission has not shown that litigation with PACILS is reasonably anticipated. Open Records Decision Nos. 518 (1989) at 5 (governmental body must show that litigation involving a specific matter is realistically contemplated). Thus, the information at issue may not be withheld from disclosure under section 552.103(a).

We also note that you seek to withhold from disclosure public documents such as records of public meetings, court documents, and published newspaper articles. Open Records Decision No. 221 (1979) (records of public proceedings of governmental body among most public of records). This type of information may not be withheld from disclosure even if section 552.103(a) were applicable.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/rho

Ref.: ID# 36325

Enclosures: Submitted documents

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