



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

November 3, 1998

Mr. Helmut (Hal) Talton  
Associate General Counsel  
Texas Department of Transportation  
Dewitt C. Greer State Highway Bldg.  
125 E. 11<sup>th</sup> Street  
Austin, Texas 78701-2483

OR98-2567

Dear Mr. Talton

You ask 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# 119300

The Texas Department of Transportation (the "department") received a request for information pertaining to the requestor's last two worker's compensation claim denials. You assert that the requested information is excepted from disclosure under section 552.103. We have considered your arguments and reviewed the submitted representative sample of documents.<sup>1</sup>

First, we will address the requestor's contention that you failed to respond to his original e-mail request for information within the statutory ten business days. *See* Gov't Code § 552.301. You assert that the request was not a proper e-mail request because it was not sent to the officer for public information or the officer's designee. Section 552.301 provides that "a written request includes a request made in writing that is sent to the officer for public information, or the person designated by that officer, by electronic mail or facsimile transmission." You explain that the department employee to whom the e-mail was sent is neither the department's public information officer nor is he the officer's designee. Thus, we agree that the e-mail request was not a proper written request and therefore did not

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<sup>1</sup>In reaching our conclusion here, we assume that 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.

require the department to respond to the request. Gov't Code § 552.301 (governmental body's duty to request a ruling from the attorney general arises only after it receives a written request).

Next, we note that the submitted documents include medical records. Access to medical records is governed by provisions outside the Open Records Act. Open Records Decision No. 598 (1991). The Medical Practice Act (the "MPA"), article 4495b of Vernon's Texas Civil Statutes, protects from disclosure "[r]ecords of the identity, diagnosis, evaluation, or treatment of a patient by a physician that are created or maintained by a physician." V.T.C.S. art. 4495b, § 5.08(b). The MPA provides for both confidentiality of medical records and certain statutory access requirements. *Id.* at 2. The medical records submitted to this office for review may only be released as provided by the MPA. Here, the subject of the medical records is the requestor. Section 5.08(g)(2) provides that an exception to confidentiality exists when "the patient or someone authorized to act on his behalf submits a written consent to the release of any confidential information."

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. A governmental body 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. *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. A governmental body must meet both prongs of this test for information to be excepted under 552.103(a). For purposes of section 552.103(a), this office considers a contested case under the Texas Administrative Procedure Act ("APA"), Government Code chapter 2001, to constitute "litigation." Open Records Decision No. 588 at 7 (1991) (construing statutory predecessor to the APA).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.<sup>2</sup> Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must

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<sup>2</sup>In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982), and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

You inform this office that the requestor's claims are pending a benefit review conference before the Texas Workers' Compensation Commission.<sup>3</sup> You further explain that possible subsequent stages in any workers' compensation claim are the contested case hearing conducted under the APA, followed by a petition for review before an appeals panel, and the filing of a suit in district court. After a review of your arguments, we conclude that you have not shown that litigation is reasonably anticipated in this particular case for purposes of section 552.103(a). Thus, you may not withhold the requested information based on section 552.103(a).

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 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Yen-Ha Le  
Assistant Attorney General  
Open Records Division

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<sup>3</sup>Pursuant to section 410.021 of the Labor Code,

A benefit review conference is a nonadversarial, informal dispute resolution proceeding designed to:

- (1) explain, orally and in writing, the rights of the respective parties to a workers' compensation claim and the procedures necessary to protect those rights;
- (2) discuss the facts of the claim, review available information in order to evaluate the claim, and delineate the disputed issues; and
- (3) mediate and resolve disputed issues by agreement of the parties in accordance with this subtitle and the policies of the commission.

YHL/nc

Ref.: ID# 119300

Enclosures: Submitted documents

cc: Mr. Jose M. Vela, Jr.  
P.O. Box 791  
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(w/o enclosures)