



May 10, 1999

Mr. Don Ballard
Assistant Attorney General
Open Records Coordinator
P.O. Box 12548
Austin, Texas 78711-2548

OR99-1265

Dear Mr. Ballard:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 123954 and ID# 125282.

The Office of the Attorney General (the "OAG") received a request for "all documents in connection with the Attorney General's investigation of the Mary Lee Foundation" and a request for "all documents relating to the investigation of the Mary Lee Foundation from 1977-present, and any and all documents relating to the Donna Walker Trust." You inform us that you have no information concerning the Donna Walker Trust. You have submitted to this division a representative sample of the requested information.¹ You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Some of the requested information is in the possession of the Consumer Protection Division. The Consumer Protection Division argues that Exhibits 2, 3, and 4 are confidential under section 552.101. These documents were produced in response to a Civil Investigative Demand ("CID") issued under the Texas Deceptive Trade Practices-Consumer Protection Act, section 17.61 of the Texas Business and Commerce Code (the "DTPA"), and the Texas

¹In 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) (where requested documents are numerous and repetitive, governmental body should submit a representative sample; but if each record contains substantially different information, all must be submitted). 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.

Miscellaneous Corporation Laws Act, article 1302-5.01 *et seq.* of the Vernon's Texas Civil Statutes, ("Misc. Corp. Act"). Documents produced in response to a CID are confidential under section 17.61(f) of the Business and Commerce code, the DTPA, and article 1302-5.01 of Vernon's Texas Civil Statutes, the Miscellaneous Corporation Act. Section 17.61(f) of the Texas Business and Commerce Code provides in part:

(f) No documentary material produced pursuant to a demand under this section, unless otherwise ordered by a court for good cause shown, shall be produced for inspection or copying by, nor shall its contents be disclosed to any person other than the authorized employee of the consumer protection division without the consent of the persons who produced the material. . . .

Bus. & Com. Code § 17.61(f). Article 1302-5.04 of Vernon's Texas Civil Statutes provides in part:

A. The Attorney General, or his authorized assistants or representative, shall not make public, or use said copies or any information derived in the course of said examination of said records or documents, except in the course of some judicial proceedings in which the State is a party. . . .

V.T.C.S. Art. 1302-5.04. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision. This section encompasses information protected by other statutes. Therefore, we agree that the information you obtained under a CID must be withheld.

The Consumer Protection Division argues that some of the information in its possession is excepted from disclosure under section 552.103 of the Government Code. Section 552.103(a) of the Government Code excepts from disclosure information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, 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; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

The OAG's Consumer Protection Division 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. *University*

of Tex. Law Sch. v. Texas 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 Consumer Protection Division must meet both prongs of this test for information to be excepted under section 552.103(a).

Based on the representations and arguments you have made and our review of the submitted documents, we conclude that litigation is reasonably anticipated and the information at issue relates to the anticipated litigation. Consequently, you may withhold the remaining requested information in the possession of the Consumer Protection Division from disclosure under section 552.103(a).

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. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

The remainder of the requested information is in the possession of the Medicaid Fraud Control Unit ("MFCU"). The MFCU argues that the requested information in its possession is protected from disclosure under sections 552.101, 552.108, and 552.111 of the Government Code.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Section 242.127 of the Health and Safety Code provides:

A report, record, or working paper used or developed in an investigation made under this subchapter and the name of any person making a report under this subchapter are confidential and may be disclosed only for purposes consistent with the rules adopted by the board or the designated agency.

Health & Safety Code § 242.127. You state that the investigation by the MFCU was based upon a complaint referred to the OAG from the Texas Department of Human Services and that much of the documentation was obtained from the Texas Department of Human Services. Therefore, we conclude that Appendices 2 and 3 containing the complaint and

other documents obtained from the Department of Human Services are made confidential by section 552.101 of the Government Code in conjunction with section 242.127 of the Health and Safety Code.²

The MFCU contends that disclosure of the information contained in Appendix 4 is prohibited under section 12.003 of the Human Resources Code. Section 12.003 provides:

(a) Except for purposes directly connected with the administration of the department's assistance programs, it is an offense for a person to . . . disclose . . . the names of, or any information concerning, persons applying for or receiving assistance if the information is . . . derived from the records . . . of the department

Hum. Res. Code § 12.003. The information contained in Appendix 4 is confidential under section 552.101 of the Government Code and section 12.003 of the Human Resources Code. You must withhold Appendix 4.

The MFCU also argues that it is a law enforcement agency because it is

charged by federal law, to conduct "a Statewide program for investigation and prosecuting, or referring for prosecution, violations of all applicable State laws pertaining to fraud in the administration of the Medicaid program," to include the "abuse or neglect of patients in health care facilities receiving payments under the State Medicaid plan." *See* 42 C.F.R. 1007.11

Section 552.108 of the Government Code excepts from required public disclosure

(a) Information 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;

(2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication; or

²We note, however, that a completed written investigation report used or developed by the Texas Department of Human Services is available from the Department of Human Services after deidentification of the report. 40 T.A.C. § 19.2010-19.201.

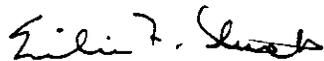
Gov't Code § 552.108(a). You inform us that the documents in Appendix 1 relate to criminal investigations that were closed due to insufficient evidence. Because the investigations did not result in conviction or deferred adjudication, the MFCU may withhold Appendix 1 under section 552.108(a)(2).

Finally, the MFCU asserts that section 552.111 of the Government Code protects from disclosure Appendix 5. Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 at 5-6 (1993). In addition, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5.

You may withhold Appendix 5 under section 552.111 as advice and recommendations reflecting the policymaking functions of the MFCU.

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 division.

Sincerely,



Emilie F. Stewart
Assistant Attorney General
Open Records Division

EFS\nc

Ref: ID# 123954 and ID# 125282

Encl: Submitted documents

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