



December 6, 2001

Mr. Craig H. Smith
Deputy General Counsel
Texas Workers' Compensation Commission
4000 South IH-35, MS-4D
Austin, Texas 78704

OR2001-5693

Dear Mr. Smith:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 155763.

The Texas Workers' Compensation Commission (the "commission") received two requests for information concerning the proposed Medical Fee Guideline, including: (1) drafts of discussions of comments; (2) copies of comments disseminated to Milliman, GSC, or other firms; (3) replies and responses to comments; (4) evaluations of individual or staff responses to posed questions; and (5) the names and qualifications of staff members that worked on comments. You state that the commission does not have information responsive to categories 1, 3, 4, and 5 of the request. We note that the Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). You also indicate that the commission will release to the requestor the information responsive to category 2 of the request that has previously been released. However, you claim that the remainder of the information responsive to category 2 of the request is excepted from disclosure under sections 552.103 and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We begin by noting that this office has ruled on a similar request for information. You previously sought an open records decision from this office with regard to an open records request for all files and documents related to the process of reviewing the commission's 1996 Medical Fee Guideline and considering updates and alternatives to the Medical Fee Guideline. This office assigned your request ID# 144527 and issued a ruling, Open Records Letter No. 2001-0911 (2001). Now, you have a pending lawsuit filed against the Office of the Attorney General over the release of certain information in question in Open Records

Letter No. 2001-0911 (2001).¹ When an open records ruling of this office is challenged in court, this office allows the trial court to resolve the issue of whether the information at issue is subject to public disclosure. Therefore, we will not address in this ruling whether the information at issue in *Texas Workers' Compensation Commission v. Cornyn* is subject to disclosure.

With respect to the remainder of the submitted information, we address your argument under section 552.103 of the Government Code. Section 552.103 provides as follows:

(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.

The commission 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. *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 commission must meet both prongs of this test for information to be excepted under 552.103(a).

You indicate that the commission is currently involved in litigation concerning the commission's revision of the Medical Fee Guideline. In support of this argument, you have submitted pleadings from the case of *Patient Advocates of Texas v. Texas Workers' Compensation Commission*, No. GN1-02329 (126th Judicial District Court, Travis County, Texas July 27, 2001). Based on your arguments and our review of the submitted information, we agree that the information relates to pending litigation and therefore may be withheld from disclosure under section 552.103 of the Government Code.²

¹The style of the pending case is *Texas Workers' Compensation Commission v. Cornyn*, No. GN100813 (345th Judicial District Court, Travis County, Tex. Mar. 16, 2001).

²Based on this finding, we need not reach your remaining argument.

We note, however, that 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 pending 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).

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

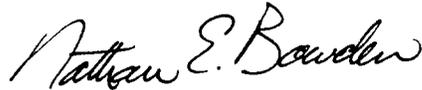
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/sdk

Ref: ID# 155763

Enc: Submitted documents

c: Dr. C.M. Schade, MD, Ph.D.
President
Texas Pain Society
2729 Exposition Boulevard, Suite 167
Austin, Texas 78703
(w/o enclosures)