



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 20, 2004

Ms. Karen Rabon  
Assistant Attorney General  
Public Information Coordinator  
Office of the Attorney General  
P.O. Box 12548  
Austin, Texas 78711-2548

OR2004-4177

Dear Ms. Rabon:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 202103.

The Office of the Attorney General (the "OAG") received a request for information relating to the OAG's investigation of Dynacq Healthcare ("Dynacq"). You state that some of the responsive information will be released. You claim, however, that the remaining information, which is maintained by the Antitrust and Civil Medicaid Fraud Division ("CMFD") and the Medicaid Fraud Control Unit ("MFCU"), is excepted from disclosure under sections 552.101, 552.103, 552.108, and 552.130 of the Government Code. We have considered your claimed exceptions to disclosure and have reviewed the submitted information.

Initially, you claim that some of the submitted records are excepted from disclosure under section 552.103 of the Government Code. Section 552.103, the litigation exception, provides in relevant part 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.

Gov't Code § 552.103(a), (c). The 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 on the date that the request for information was received, 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 governmental body must meet both prongs of this test for information to be excepted under 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986). When the governmental body is the prospective plaintiff in litigation, the evidence of anticipated litigation must at least reflect that litigation involving a specific matter is “realistically contemplated.” See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (investigatory file may be withheld if governmental body’s attorney determines that it should be withheld pursuant to Gov’t Code § 552.103 and that litigation is “reasonably likely to result”).

In this instance, you state that the CMFD is currently investigating Dynacq for improper solicitation of patients under chapter 102 of the Texas Occupations Code and for potential violations of the Texas Miscellaneous Corporation Laws Act. You state that this investigation may result in litigation and was undertaken for that purpose. You also state that Exhibits C and D relate to this potential lawsuit. After reviewing your arguments and the records at issue, we agree that Exhibits C and D relate to the anticipated litigation.

We note, however, that when the opposing party in the litigation has seen or had access to requested records, there is no justification for withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). It appears that some of the records contained in Exhibit C may have been seen by the opposing party. To the extent that the opposing parties in the anticipated litigation have seen or had access to any of the information in Exhibits C and D, that information must be released. If the records in Exhibits C and D have not been previously seen by the opposing parties, they may be withheld from disclosure under section 552.103. 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).

Next, you argue that the remaining records are excepted from disclosure under section 552.108 of the Government Code.<sup>1</sup> Section 552.108(a) excepts from disclosure “[i]nformation 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.” Gov’t Code § 552.108(a)(1). Generally, a governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id* 552.301(e)(1)(a); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). In this instance, you explain that Exhibits E and F relate to an ongoing criminal investigation being conducted by MFCU. You also state that the release of these records would compromise the investigation of this matter. Based on your representations and our review of the records, we agree that the OAG may withhold the remaining records under section 552.108(a)(1). *See Houston Chronicle Publ’g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref’d n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases).<sup>2</sup>

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

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<sup>1</sup>We assume that the sample records submitted to this office as Exhibits E and F are 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.

<sup>2</sup>Because we are able to make a determination under sections 552.103 and 552.108, we need not address your additional arguments against disclosure.

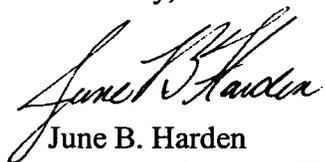
records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these 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); *Texas 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



June B. Harden  
Assistant Attorney General  
Open Records Division

JBH/seg

Ref: ID# 202103

Enc: Submitted documents

c: Ms. Leigh Hopper  
Houston Chronicle  
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Houston, Texas 77002  
(w/o enclosures)