ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 24, 2006

Ms. Robin Chapman
Assistant General Counsel
Texas Department of State Health Services
1100 West 49th Street
Austin, Texas 78756-3199

OR2006-00797

Dear Ms. Chapman:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 239629.

The Texas Department of State Health Services (the "department") received a request for the entire case file regarding a named counseling center. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, 552.136, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.[1]

Initially, we note that portions of the submitted information are subject to required public disclosure under section 552.022 of the Government Code, which provides in relevant part:

> the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

[1]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.

> (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). The submitted information includes a completed investigation. The completed investigation must be released under section 552.022 unless it is excepted from disclosure under section 552.108 or expressly confidential under other law. You claim that the completed investigation is excepted under section 552.103. However, section 552.103 is a discretionary exception that is intended to protect only the interests of the governmental body and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103);Open Records Decision No. 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such section 552.103 does not constitute "other law" that makes information confidential. Accordingly, we conclude that the department may not withhold the completed investigation, which we have marked, under section 552.103, and it must be released.

Turning to the remaining information, we first address your claim under section 552.103, as it is potentially the broadest exception to disclosure you claim. Section 552.103 of the Government Code 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). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable to the information that it seeks to withhold. To meet this burden, the governmental body must show that (1) litigation is pending or reasonably anticipated on the date that the request for information is received, 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 governmental body must meet both prongs of this test for information to be excepted under 552.103(a). *Id.* 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").

You explain, and the submitted information reflects, that the department has formally notified the requestor of its intent to pursue disciplinary action against the counseling center at issue, and that the requestor has disputed the allegations and requested an administrative hearing. As such, you assert that the litigation process has commenced and formal litigation before the State Office of Administrative Hearings is expected. We note that, for purposes of section 552.103(a), this office considers a contested case under the Texas Administrative Procedures Act, chapter 2001 of the Government Code, to constitute "litigation." *See* Open Records Decision No. 588 (1991). Based on your representations and our review, we determine that litigation in this matter was reasonably anticipated by the department prior to the date that the department received the present request. We further find that the submitted information relates to the anticipated litigation for purposes of section 552.103(a).

We note that the department has not identified the source of the documents. It appears, however, that much of the submitted information was obtained from the requestor and consists of her administrative and client records relating to the operation of the counseling center. Absent special circumstances, 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, during the pendency of the litigation the department may withhold under section 552.103(a) any submitted records to which the requestor has not seen or had access to.[2] *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982) (stating that applicability of section 552.103(a) ends once litigation has been concluded). However, to the extent that the requestor has seen or had access to the submitted records, the department may not now withhold them from disclosure under section 552.103(a). We have reviewed the documents that the requestor has clearly had access to and will address the applicability of any additional arguments against disclosure. However, we cannot determine whether the requestor had access to many other submitted documents. To the extent that the requestor has had access to other documents which contain confidential information, use our markings as an indication of the types of information that should be withheld.

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[2] Because we find that the department may withhold certain documents under section 552.103, we need not address your remaining arguments for those documents.

Some of the information that the requestor has seen or had access to contains information regarding Medicaid benefits. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses sections 12.003 and 21.012 of the Human Resources Code, which prohibit the disclosure of information concerning clients of a state plan for assistance, except for a purpose directly connected with the administration of the plan. *See* Hum. Res. Code §§ 12.003, 21.012; *see also* Open Records Decision Nos. 584 (1991), 166 (1977). Section 12.003 provides in relevant part:

> (a) Except for purposes directly connected with the administration of the [Department of Human Services'] assistance programs, it is an offense for a person to solicit, disclose, receive, or make use of, or to authorize, knowingly permit, participate in, or acquiesce in the use of the names of, or any information concerning, persons applying for or receiving assistance if the information is directly or indirectly derived from the records, papers, files, or communications of the [Department of Human Services] or acquired by employees of the [Department of Human Services] in the performance of their official duties.

Hum. Res. Code § 12.003(a). The term "assistance" in sections 12.003 and 21.012 of the Human Resources Code includes "all forms of assistance and services for needy persons authorized by Subtitle C." Hum. Res. Code § 11.001(4); *see also id.* § 31.001 *et seq.* (subtitle C, pertaining to assistance programs).

In Open Records Decision No. 584 (1991), this office determined that "[t]he inclusion of the words 'or any information' juxtaposed with the prohibition on disclosure of the names of the [Department of Human Services'] clients clearly expresses a legislative intent to encompass the broadest range of individual client information, and not merely the clients' names and addresses." *Id.* at 3. Consequently, it is the specific information pertaining to individual clients, and not merely the clients' identities, that is made confidential under section 12.003. *See also* Hum. Res. Code § 21.012(a) (requiring provision of safeguards that restrict use or disclosure of information concerning applicants for or recipients of assistance programs to purposes directly connected with administration of programs).

You indicate that the some of the remaining documents pertain to individual recipients of Medicaid benefits and that release of such information in this instance is not a release for purposes directly connected with the administration of the Medicaid program. We agree that the disclosure of information identifying an individual as a Medicaid recipient is prohibited and have marked the information that the department must withhold pursuant to section

552.101 of the Government Code in conjunction with section 12.003 of the Human Resources Code.[3]

Some of the remaining information that the requestor has seen or had access to are mental health records. Section 552.101 also encompasses chapter 611 of the Texas Health and Safety Code, which specifically addresses the public availability of mental health records. Section 611.002 of the Health & Safety Code provides in pertinent part:

> (a) Communications between a patient and a professional, and records of the identity, diagnosis, evaluation, or treatment of a patient that are created or maintained by a professional, are confidential.
>
> (b) Confidential communications or records may not be disclosed except as provided by Section 611.004 or 611.0045.

Under section 611.001, a "professional" is (1) a person authorized to practice medicine, (2) a person licensed or certified by the state to diagnose, evaluate or treat mental or emotional conditions or disorders, or (3) a person the patient reasonably believes is authorized, licensed, or certified. A portion of the submitted information consists of records of the identity, diagnosis, evaluation, or treatment of a patient that are confidential with respect to the general public and may only be disclosed as provided under sections 611.004 and 611.0045 of the Health and Safety Code. Since it has not been demonstrated that the access provisions of chapter 611 of the Texas Health and Safety Code apply in this instance, we conclude that the marked records must be withheld in accordance with section 611.002 of the Health and Safety Code.[4]

Some of the remaining information is subject to common law privacy. Section 552.101 also encompasses the doctrine of common law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. We have marked the information that identifies individuals who have received mental health services and must be withheld under section 552.101 in conjunction with common law privacy.

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[3] Because we find that the department may withhold certain documents under section 12.003, we need not address your remaining arguments for those documents.

[4] Because we find that the department may withhold certain documents under section 611.002, we need not address your remaining arguments for those documents.

You also assert that some of the remaining information is excepted from disclosure under section 552.136 of the Government Code. Section 552.136 states that "[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136. We have marked a bank account number that the department must withhold under section 552.136. The department asserts that provider identification numbers that you have marked are subject to section 552.136. However, section 552.136 is designed to protect privacy interests. Therefore, section 552.136 cannot be used to withhold an access device number from the person to whom it belongs. *See* Gov't Code § 552.023. Here, the requestor has a right of access to her own provider identification number. You have also not explained how other numbers you have marked could be used to access goods or services. *See* Gov't Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies). As such, this information must be released.

Finally, some of the remaining information is subject to section 552.137 of the Government Code, which excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). The e-mail address we have marked is not specifically excluded by section 552.137(c). You do not inform us that the department has received consent for the release of the e-mail address at issue. Therefore, the department must withhold the e-mail address we have marked under section 552.137.

In summary, during the pendency of the litigation the department may withhold under section 552.103(a) any submitted records to which the requestor has not seen or had access to. For the submitted information that the requestor has had access to: (1) we have marked the information that the department must withhold pursuant to section 552.101 of the Government Code in conjunction with section 12.003 of the Human Resources Code; (2) we have marked the records that must be withheld in accordance with section 611.002 of the Health and Safety Code; (3) we have marked the information that identifies individuals who have received mental health services and that must be withheld under section 552.101 in conjunction with common law privacy; (4) we have marked a bank account number that the department must withhold under section 552.136. The department must withhold the e-mail address we have marked under section 552.137. The remaining information must be released.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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,

José Vela III
Assistant Attorney General
Open Records Division

JV/sdk

Ref: ID# 239629

Enc. Submitted documents

c: Renee Whittington Murrel
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(w/o enclosures)