



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

June 23, 2009

Mr. Carey E. Smith
General Counsel
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

OR2009-08615

Dear Mr. Smith:

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# 347830.

The Texas Health and Human Services Commission (the "commission") received a request for (1) the contract between Affiliated Computer Services, Inc. ("Affiliated") and the commission to administer the contract for Texas Medicaid from 2000 through April 10, 2009, (2) the contract between Texas Healthcare Medicaid and Healthcare Partnership ("TMHP") and the commission to administer the contract for Texas Medicaid from 2000 through April 10, 2009, (3) the contract for Texas Medicaid from 2000 through April 10, 2009, (4) documents reflecting the geographical area the Primary Care Case Management served from 2002 through April 10, 2009, (5) bid documents submitted by Affiliated to the commission related to the Texas Medicaid contract, (6) documents related to a named doctor's participation, suspension, release, termination, and/or reinstatement into Texas's Medicaid program, (7) documents between TMHP and the commission related to the named doctor, and (8) documents between Affiliated and the commission related to the named doctor. You state you have released the information requested in items 1-5. You claim the remaining requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Section 552.103 of the Government Code provides:

- (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 the governmental body received the request for information 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 section 552.103(a).

To establish 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). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See id.* Concrete evidence to support a claim 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. *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined 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). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

You have submitted a Plaintiff's Original Petition and Request for Disclosure, *Rafael Valenzuela, M.D. v. Texas Medicaid and Healthcare Partnership, et al.*, No. 08-04657 (116th Dist. Ct., Dallas County, Tex., filed Apr. 28, 2008). You state although the commission is not currently a party to the suit, the commission reasonably expects to be drawn into the dispute between Dr. Valenzuela and TMHP, and the time for adding parties to the lawsuit has not yet expired. You explain under section 32.021(a) of the Human Resources Code the commission is the single state agency responsible for the administration of the Medicaid Program. You further explain the commission contracts with TMHP to manage several aspects of the program, including the development and administration of the Medicaid PCCM program, and you assert the current lawsuit arose from TMHP's performance of this function. You argue because of the commission's statutory designation

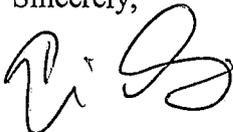
as the single state agency and its contractual relationship with TMHP, it is not unreasonable to expect the commission may become embroiled in the current dispute. Further, you explain and provide an example of how the commission is often drawn into disputes between Medicaid providers and TMHP. Based on your representations and our review, we conclude litigation was reasonably anticipated on the date the commission received the request for information. We additionally find the submitted information relates to the litigation for the purposes of section 552.103(a). The commission may therefore withhold this information pursuant to section 552.103.

We note once the information has been obtained by all parties to the pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information either obtained from or provided to the opposing parties in the pending litigation is not excepted from disclosure under section 552.103(a), and 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 information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Emily Sitton
Assistant Attorney General
Open Records Division

EBS/rl

Ref: ID# 347830

Enc. Submitted documents

c: Requestor
(w/o enclosures)