



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 5, 2011

Ms. Sara Shiplet Waitt
Senior Associate Commissioner
Texas Department of Insurance
Legal and Regulatory Affairs, MC 110-1A
P.O. Box 149104
Austin, Texas 78714-9104

OR2011-00282

Dear Ms. Waitt:

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# 405014 (TDI# 109502).

The Texas Department of Insurance (the "department") received a request for communications discussing changes in the Division of Worker's Compensation's process for denial and approval of request for designated doctor communications, and any information related to problems with the previous process.¹ You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111 and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note you have marked parts of the submitted documents as not responsive to the instant request. We also note that some of the submitted information, which we have

¹You state the department sought and received clarification of the request. See Gov't Code § 552.222(b) (stating that if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); see also *City of Dallas v. Abbott*, 304 S.W.3d 380, 384 (Tex. 2010) (where governmental body seeks clarification or narrowing of request for information, ten-day period to request attorney general decision is measured from date request is clarified or narrowed).

²We assume 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 those records contain substantially different types of information than that submitted to this office.

marked, was created after the date of the request. Thus, this information is not responsive to the request. This decision does not address the public availability of the non-responsive information, and that information need not be released in response to the request.

We note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides in part:

(a) Without limiting the amount or kind of information that is public information under this chapter, 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:

...

(15) information regarded as open to the public under an agency's policies[.]

Gov't Code § 552.022(a)(15). You have submitted information the department has made available to the public that is subject to section 552.022(a)(15). Although you raise section 552.103 of the Government Code for this information, this exception is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. *See id.* § 552.007; *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 Decisions No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the department may not withhold the information subject to section 552.022(a)(15) under section 552.103. As you raise no other exceptions against disclosure for the information subject to section 552.022(a)(15), this information, which we have marked, must be released. We will consider your claim under section 552.103 along with your remaining raised exceptions for the submitted information not subject to section 552.022.

Section 552.103 of the Government Code 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.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You provide documentation showing that prior to the department's receipt of the request, a lawsuit styled *Indemnity Ins. Co. of North America vs. Candida Jove*, Cause No. 10-10523, was filed and is currently pending against the department in the 191st Judicial District Court of Dallas County, Texas. We therefore agree the litigation was pending at the time of the request. You state the pending litigation involves injury disputes regarding various medical claims of an injured worker. You assert the submitted information is related to the pending litigation because it involves information pertaining to designated doctors and letters of clarification at issue in the litigation. Based on your representations and our review of the submitted information, we find the department has established the information at issue relates to the pending litigation. Therefore, the department may withhold the information not subject to section 552.022 under section 552.103 of the Government Code.³

We note once the information at issue has been obtained by all parties to the pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. See Open Records Decision Nos. 349 (1982), 320 (1982). Accordingly, the department may only withhold information the opposing party to the litigation has not seen or had access to under section 552.103 of the Government Code. We note the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

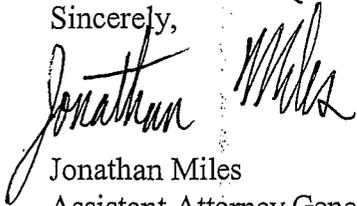
In summary, with the exception of the information the department has made available to the public that is subject to section 552.022(a)(15), the department may withhold the submitted information under section 552.103 of the Government Code. The information subject to section 552.022(a)(15) of the Government Code must be released.

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.

³As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in cursive script, appearing to read "Jonathan Miles".

Jonathan Miles
Assistant Attorney General
Open Records Division

JM/em

Ref: ID# 405014

Enc. Submitted documents

c: Requestor
(w/o enclosures)