



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 8, 2013

Mr. Robert W. Patterson
Open Records Coordinator
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

OR2013-04001

Dear Mr. Patterson:

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# 480708.

The Texas Health and Human Services Commission (the "commission") received three requests from the same requestor for specified correspondence, including e-mails between the commission and WFAA-TV, from a specified time period and information pertaining to a specified audit. You inform us the commission has released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.116 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹ We have also received and considered comments submitted by the Office of the Attorney General (the "OAG"). *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, you assert the requestor has withdrawn his request for e-mails between the commission and WFAA-TV by operation of law because the commission sent the requestor a written statement under section 552.231(b) of the Government Code on January 8, 2013,

¹We assume the "representative sample" of information 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 those submitted to this office.

and as of February 13, 2013, the commission has not received a response from the requestor. A section 552.231 statement is required when the governmental body determines that responding to a request for information will require the programming and manipulation of data and the information could be made available in the requested form only at a cost that covers the programming and manipulation. *See id.* § 552.231(a). Section 552.231(b) states:

(b) The written statement must include:

- (1) a statement that the information is not available in the requested form;
- (2) a description of the form in which the information is available;
- (3) a description of any contract or services that would be required to provide the information in the requested form;
- (4) a statement of the estimated cost of providing the information in the requested form, as determined in accordance with the rules established by the attorney general under Section 552.262; and
- (5) a statement of the anticipated time required to provide the information in the requested form.

Id. § 552.231(b). Section 552.262 of the Government Code provides in pertinent part:

(b) The rules of the attorney general shall prescribe the methods for computing the charges for providing copies of public information in paper, electronic, and other kinds of media and the charge, deposit, or bond required for making public information that exists in a paper record available for inspection. The rules shall establish costs for various components of charges for providing copies of public information that shall be used by each governmental body in providing copies of public information or making public information that exists in paper record available for inspection.

Id. § 552.262(b). If the requestor does not timely respond to the commission's written statement, the requestor is considered to have withdrawn the request for information. *Id.* § 552.231(d-1). You have provided our office with the written statement you provided to the requestor. Upon review, we agree this statement complies with the requirements of section 552.231(b). *See id.* § 552.231(b). Further, you inform us the requestor has not responded to the written statement in accordance with section 552.231(d-1). *See id.* § 552.231(d-1). Accordingly, we agree section 552.231 of the Government Code is

applicable to the requestor's request for e-mails between the commission and WFAA-TV, and the commission need not provide the requestor with this information.²

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. This section provides, in pertinent 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 unless made confidential under this chapter or other law:

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

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Id. § 552.022(a)(1), (3). In this instance, the information at issue includes a completed audit report subject to section 552.022(a)(1) and information relating to the receipt or expenditure of public funds by a governmental body subject to section 552.022(a)(3). The information subject to section 552.022(a)(1), which we have marked, must be released unless it is excepted by section 552.108 of the Government Code or made confidential by the Act or other law. *See id.* The information subject to section 552.022(a)(3), which we have marked, must be released unless it is made confidential by the Act or other law. *See id.* Although you raise section 552.103 of the Government Code for the information at issue, this section is a discretionary exception to disclosure and does not make information confidential under the Act. *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 Nos. 665 at 2 n.5 (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). As such, section 552.103 does not make information confidential for the purposes of section 552.022. Therefore, none of the information subject to sections 552.022(a)(1) and 552.022(a)(3) may be withheld under section 552.103 of the Government Code. Accordingly, as no further exceptions to disclosure are raised for the completed audit report, it must be released pursuant to section 552.022(a)(1) of the Government Code. We note, however, the information subject to section 552.022(a)(3) is protected under section 552.101 of the Government Code, which

²We note, as a result of the requestor's partial withdrawal, the submitted information we have marked is not responsive to the present requests for information. The commission need not release non-responsive information in response to these requests, and this ruling will not address it.

does make information confidential under the Act. We will also consider the other arguments raised for the information not subject to section 552.022.

We first address the information subject to section 552.022(a)(3). Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information other statutes make confidential, such as section 12.003 of the Human Resources Code, which provides in relevant part:

(a) Except for purposes directly connected with the administration of the [commission’s] 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 [commission] or acquired by employees of the [commission] in the performance of their official duties.

Hum. Res. Code § 12.003(a); *see also id.* § 21.012 (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).³ The term “assistance” in sections 12.003 and 21.012 includes “all forms of assistance and services for needy persons authorized by Subtitle C” of title 2 of the Human Resources Code. *Id.* § 11.001(4); *see also id.* § 31.001 *et seq.* (Hum. Res. Code tit. 2, subtit. C, Assistance Programs).

In Open Records Decision No. 584 (1991), this office concluded that “[t]he inclusion of the words ‘or any information’ juxtaposed with the prohibition on disclosure of the names of [commission’s] clients clearly expresses a legislative intent to encompass the broadest range of individual client information, and not merely the clients’ names and addresses.” Open Records Decision No. 584 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* 42 U.S.C. § 1396a(a)(7) (state plan for medical assistance must provide safeguards that restrict use or disclosure of information concerning applicants and recipients to purposes directly connected with administration of plan); 42 C.F.R. §§ 431.300 *et seq.*; 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); Open Records Decision No. 166 (1977).

³We note the former Texas Department of Human Services (the “DHS”) ceased operations on September 1, 2004, and the commission now administers the Medicaid program formerly administered by the DHS. *See* Health and Human Services Commission website at <http://www.hhsc.state.tx.us>; Act of June 2, 2003, 78th Leg., R.S., ch. 198, 2003 Tex. Gen. Laws 611.

We note the information at issue identifies and relates to recipients of benefits of the Medicaid program, which is an assistance program administered by the commission. We understand this information was directly or indirectly derived from the records of the commission. Further, we note the release of the information at issue in this instance would not be for purposes directly connected to the administration of the Medicaid program. Accordingly, we conclude the information we have marked pursuant to section 552.022(a)(3) of the Government Code must be withheld under section 552.101 of the Government Code in conjunction with section 12.003 of the Human Resources Code.

We now address the OAG's argument under section 552.103 of the Government Code for the information not subject to section 522.022. Section 552.103 provides, in relevant part:

(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 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 that 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. See Open Records Decision No. 551 at 4 (1990).

The OAG informs us, and provides documentation showing, that it was involved in two lawsuits pending in Travis County District Court on the date the commission received the requests for information. Thus, we find litigation involving the OAG was pending when the commission received the requests. The OAG also states the information at issue relates directly to these pending litigations. Based on the OAG's representations and our review, we agree this information is related to pending litigation for purposes of section 552.103. Accordingly, the commission may withhold the responsive information not subject to

section 552.022 of the Government Code under section 552.103 of the Government Code on behalf of the OAG.⁴

However, we note the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Therefore, once the information at issue has been obtained by all parties to the litigation through discovery or otherwise, a section 552.103(a) interest no longer exists as to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We also note the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the completed audit report we have marked must be released pursuant to section 552.022(a)(1) of the Government Code. The commission must withhold the information we have marked pursuant to section 552.022(a)(3) of the Government Code under section 552.101 of the Government Code in conjunction with section 12.003 of the Human Resources Code. The commission may withhold the responsive information not subject to section 552.022 of the Government Code under section 552.103 of the Government Code on behalf of the OAG.

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, toll free at (888) 672-6787.

Sincerely,



Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

KLC/bhf

⁴As our ruling for this information is dispositive, we need not address the commission's remaining arguments against its disclosure.

Ref: ID# 480708

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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(w/o enclosures)