



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 25, 1994

Mr. Frank Stenger-Castro
General Counsel
Texas Workers' Compensation Insurance Facility
8303 MoPac Expressway North, Suite 310
Austin, Texas 78759-8396

OR94-683

Dear Mr. Stenger-Castro:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 28084.

The Texas Workers' Compensation Insurance Facility ("the facility") received a request for several items of information. You assert that the facility may withhold all of the requested items of information from required public disclosure based on section 552.103 of the Government Code. As for items 9, 11, and 12, you additionally raise sections 552.107(1) and 552.111 of the Government Code. You submitted representative samples of documents you say the facility believes are exempt from required public disclosure. These samples include two letters, and a memorandum from William P. Harbeson, Assistant General Counsel.

Section 552.103(a) applies to information

(1) relating to litigation of a civil or criminal nature or settlement negotiations, 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; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision Nos. 551 (1990); 588 (1991).

You assert that this exception applies here because you anticipate that the facility will be made a party to a lawsuit that is pending in the 270th District Court of Harris County, Texas, *Producers Assistance Corporation v. Employers Insurance of Wausau*. You state that:

[t]he suit involves the denial of Longshore and Harbor Workers Act (LHWCA) coverage by Wausau on a claim filed by an employee of Producers Assistance Corporation. More specifically, the plaintiff is arguing that the Pool policy did not limit LHWCA coverage to "Texas waters." The policy in question was a rejected risk policy issued by Wausau as a servicing company as defined in TEX. INS. CODE ANN. art 5.76 (a)(8)(Vernon 1985 supp), on behalf of the Pool. The insurance coverage was provided by the Pool and the liability under the policy was the Pool's. As discussed above, the liability under the policy at issue in the litigation, if any, is now the Facility's.

You essentially are arguing that litigation involving the facility is reasonably anticipated because the facility is liable on a claim under a policy that is the subject of pending litigation. We note that on all rejected risk policies, all members of the facility are reinsurers for a fractional part of the liability. See Ins. Code art. 5.76-2, § 4.02(b).

To establish that litigation is reasonably anticipated, a governmental body must provide concrete evidence that litigation is realistically contemplated; that litigation is realistically contemplated must be more than mere conjecture. See Open Records Decision No. 518 (1989). We conclude that since the liability sought to be enforced in the pending litigation is ultimately that of the facility, it is reasonable to anticipate that the facility will be brought into the litigation. We also believe that the requested information relates to the litigation. Therefore, you may withhold the requested information based on section 552.103 of the Government Code.¹

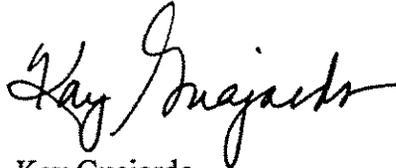
In reaching this conclusion, however, we assume that the opposing party to the anticipated litigation has not previously had access to the records at issue; absent special circumstances, once information has been obtained by all parties to the litigation, e.g., through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982). If the opposing parties in the anticipated litigation have seen or had access to any of the information in these records,

¹In light of our determination under section 552.103, we need not address your claims under sections 552.107(1) and 552.111 of the Government Code.

there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a). We also note that 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).

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Kay Guajardo
Assistant Attorney General
Open Government Section

KHG/JBP/rho

Ref.: ID# 28084

Enclosures: Submitted documents

cc: Mr. William V. Wade
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(w/o enclosures)