



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 2, 1997

Mr. Sealy Hutchings
General Counsel
Office of Consumer Credit
Commissioner
2601 North Lamar Blvd.
Austin, Texas 78705-4207

OR97-0684

Dear Mr. Hutchings:

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# 104667.

The Office of Consumer Credit Commissioner (the "Commissioner") received a request for "any and all" information contained in your office regarding Steven L. Jobe and OTW Enterprises, Inc., dba Steve's Pawn and Jewelry and World of Pawn. You assert that a "substantial amount" of the requested information is excepted from disclosure under section 552.103(a) of the Government Code, and that several of the documents are excepted under section 552.111. You also assert that a portion of the information is confidential by law pursuant to V.T.C.S. art. 5069-51.08. We have considered your arguments and have reviewed the information submitted.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the governing body is or may be a party. The Commissioner 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, and (2) the information at issue is related to that litigation. *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 (1990) at 4. The Commissioner must meet both prongs of this test for information to be excepted under section 552.103(a).

Litigation cannot be regarded as "reasonably anticipated" unless there is concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Open Records Decision Nos. 452 (1986), 331 (1982), 328 (1982). Whether litigation is reasonably

anticipated must be determined on a case-by-case basis. Open Records Decision Nos. 452 (1986), 350 (1982). This office has concluded that litigation is reasonably anticipated when an attorney makes a written demand for disputed payments and promises further legal action if they are not forthcoming, and when a requestor hires an attorney who threatens to sue a governmental entity. Open Records Decision Nos. 555 (1990), 551 (1990). However, the fact that an individual has hired an attorney or that a request for information was made by an attorney does not, without more, demonstrate that litigation is reasonably anticipated. Open Records Decision No. 361 (1983) at 2.

Included within the information submitted to this office is a letter from Brian C. Jobe, an attorney representing Steven Jobe, the requestor, in which the attorney threatens to bring suit if certain actions are not taken by the Commissioner. A copy of the petition to be filed is included. We thus find that litigation is reasonably anticipated in this case.¹ After reviewing the information submitted to this office, we conclude that some of the information is related to the anticipated litigation and may be withheld from disclosure pursuant to section 552.103(a). We have marked this information. However, we note that most of the information contained in the folder you have marked to be withheld under 552.103(a) has been seen by the requestor. When the opposing party in litigation has seen or had access to any of the information requested, there is no justification for withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). *See also* Open Records Decision No. 525 (1989) (transmittal letters, pleadings, motions, proposed orders, etc., may not be withheld under predecessor to section 552.103 once they have been released to the other party in litigation). Thus, this information must be released. We have marked those documents in this file which may be withheld under section 552.103(a).

Section 552.101 excepts from required public disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. You argue that information obtained during the course of preparation for the administrative action which resulted in the forfeiture by Mr. Jobe of his pawnshop license is made confidential under V.T.C.S. art. 5069-51.08. This provision states in pertinent part:

¹We note the requestor's attorney has informed this office that the dispute giving rise to the anticipated litigation has been resolved and that, therefore, litigation is no longer being contemplated by the requestor. Whether or not the disputed issues have been resolved is a fact determination which this office cannot make. However, if in fact the disputed issues have been resolved, then section 552.103 would be inapplicable in this case and the Commissioner may not withhold the requested records under this provision of the Government Code. We further note in this regard that a governmental body must notify this office of a change in the circumstances of the litigation underlying a section 552.103(a) claim as soon as possible after receiving notice of that change. For example, when a governmental body contends that requested information relates to reasonably anticipated litigation and a lawsuit is later filed, the governmental body must then notify this office as soon as possible that litigation is pending. Open Records Decision No. 638 (1996).

(a) At such times as the Commissioner may deem necessary, the Commissioner, or his duly authorized representative, may make an examination of the place of business of each licensee, may inquire into and examine the transactions, books, accounts, papers, correspondence and records of such licensee insofar as they pertain to the business regulated by this Act, and may examine or inspect pledged goods and purchased goods required to be identified under Section 16(9) of this Act. Such books, accounts, papers, correspondence and records shall also be open for inspection at any reasonable time by any peace officer, without need of judicial writ or other process. In the course of an examination, the Commissioner or his duly authorized representative shall have free access to the office, place of business, files, safes, and vaults of such licensee, and shall have the right to make copies of any books, accounts, papers, correspondence and records. The Commissioner or his duly authorized representative may, during the course of such examination, administer oaths and examine any person under oath upon any subject pertinent to any matter about which the Commissioner is authorized or required by this Act to consider, investigate, or secure information. . . .The information obtained in the course of any examination or inspection shall be confidential and privileged, except for lawful use by the Commissioner, or in a criminal investigation or prosecution.

Upon review of the information you have marked as confidential under V.T.C.S. art. 5069-51.08, we conclude a portion of this information is confidential by law and therefore may be withheld from disclosure under section 552.101. We have marked this information for your convenience. We note, however, that although the examination reports you seek to withhold contain information protected under article 5069-51.08, the requestor has a statutory right of access to these reports. See V.T.C.S. art. 5069-51.17(j), (k). We therefore have not marked these documents to be withheld.

Finally, you assert that several of the documents submitted are excepted from disclosure under section 552.111. Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. Section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5. While some of the documents you marked with orange tags pertain to the policy functions of the Commissioner, a portion of the information contained in these documents is purely factual. We have marked the information that may be withheld under section 552.111.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/ch

Ref.: ID# 104667

Enclosures: Marked documents

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