



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 18, 1997

Ms. Linda Cloud
Acting Executive Director
Texas Lottery Commission
P.O. Box 16630
Austin, Texas 78761-6630

OR97-2787

Dear Ms. Cloud:

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# 111324.

The Texas Lottery Commission (the "commission") received a request for information relating to "Rep. Rob Junell's Aug. 19 (actually Sept. 19) request to Mr. Lawrence Littwin for certain information" and for information regarding the "creation of a new position posted Sept. 9 for an executive assistant for policy and strategic planning." You state that "all documents and information forwarded to Representative Junell have been made available to the public, including the requestor." You claim, however, that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state or a political subdivision is or may be a party. 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, and (2) the

¹We note that you did not assert section 552.103 within the time prescribed by section 552.301 of the Government Code. When a request for an open records decision is not made within the time period prescribed by section 552.301, the requested information is generally presumed to be public. *See* Gov't Code § 552.302. However, where, as in the instant case, the governmental body submits to this office information about a change in the circumstances of pending or anticipated litigation as soon as possible after the governmental body receives notice of that change, this office will consider the claimed exception under section 552.103(a). Open Records Decision No. 638 (1996) at 3.

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 governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 (1989) at 5. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4.

In this instance, you explain that the commission is currently involved in pending litigation, *GTECH Corporation v. Texas Lottery Commission*, filed in the Travis County District Clerk's Office on November 7, 1997. You have provided this office with a copy of the petition in that case. After reviewing the submitted materials, we conclude that litigation is pending and that the requested information relates to the litigation. The commission may, therefore, withhold the requested information from disclosure.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. In addition, 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).

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 on as a previous determination regarding any other records. If you have any questions regarding this ruling, please contact our office.

Yours very truly,



Vickie Prehoditch
Assistant Attorney General
Open Records Division

VDP/alg

Ref.: ID# 111324

Enclosures: Submitted documents

cc: Mr. George Kuempel
Reporter
The Dallas Morning News
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(w/o enclosures)