



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

August 6, 1998

Mr. Ryan Tredway
Staff Attorney
Texas Department of Insurance
Legal and Compliance Division
P.O. Box 149104
Austin, Texas 78714-9104

OR98-1861

Dear Mr. Tredway:

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# 117042.

The Texas Department of Insurance (the "department") received a request for:

- 1) complaints filed with the Legal Division and/or Consumer Complaints Division of the Department regarding potential or actual violations of Former article 21.79E;
- 2) any documents which reflect or evidence the Department's interpretation of Former art. 21.79E; and
- 3) any documents which reflect or evidence discussions, meetings, or exchanges of information regarding Former art. 21.79E, including during its existence as a legislative bill or as proposed legislation.

You advise this office that the responsive information encompasses drafts of legislation with marked comments reflect the recommendations of a department employee. You also state that the department does not wish to release the proposed legislation until a final draft is completed and ready for presentation at public hearings. Additionally, you submit a draft consent order regarding a possible violation of former article 21.79E of the Insurance Code. You claim exception from public disclosure under sections 552.103, 552.106 and 552.111 of the Government Code.

Section 552.106 excepts "[a] draft or working paper involved in the preparation of proposed legislation." This section protects the internal deliberative processes of a

governmental body in enacting legislation. Open Records Decision No. 248 (1980). It does not, however, except basically factual information. Open Records Decision No. 344 (1982). Although section 552.106 is designed to encourage frank discussion on policy matters between subordinates or advisors of a legislative body, it is specifically applicable only to the "preparation of proposed legislation." Open Records Decision No. 429 (1985) at 5. Section 552.106 ordinarily applies only to persons with a responsibility to prepare information and proposals for a legislative body. Open Records Decision No. 460 (1987). You indicate that the department has the authority under article 1.25 of the Texas Insurance Code to present a report to the legislature on or before December 31 of each even-numbered year. On this basis, you assert that the submitted document as prepared by the staff constitutes draft legislation which is excepted from disclosure by section 552.106. Assuming that the staff is authorized by the department to prepare recommendations and proposals concerning proposed legislation, and based on our review of the document at issue, we conclude that the department may withhold it from public disclosure under section 552.106 of the Government Code.¹

Section 552.103(a) of the Government Code reads as follows:

(a) Information is excepted from [required public disclosure] if it is 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.

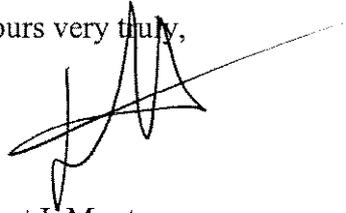
To secure the protection of section 552.103(a), a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 588 (1991). A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103 applies is a two-prong 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 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.).

¹As we find section 552.106 dispositive of the issues to which you assert both section 552.106 and 552.111, we need not address section 552.111.

The department asserts that section 552.103 is applicable because the submitted "draft consent order" comes within the definition of "settlement negotiations." However, we note that if the opposing parties in the anticipated litigation have seen or had access to any of the information in these documents, there would be no justification for withholding that information pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). Consequently, we conclude that section 552.103 is not applicable to the draft consent order submitted to this office.²

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,



Janet I. Monteros
Assistant Attorney General
Open Records Division

JIM/nc

Ref.: ID# 117042

Enclosures: Submitted documents

cc: Mr. Jason M. Panzer
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(w/o enclosures)

²We note this office recently issued Open Records Decision No. 658 (1998) in which it concluded that a governmental body may not withhold final settlement agreements from public disclosure based on section 552.101 of the Government Code in conjunction with section 154.073 of the Civil Practice and Remedies Code. Additionally, although you assert that "TDI also contends that the exception for documents regarding settlement negotiations should survive the conclusion of the litigation" we note that once the litigation is final, the applicability of section 552.103 ends. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).