OFFICE OF THE ATTORNEY GENERAL · STATE OF TEXAS
JOHN CORNYN

June 21, 1999

Mr. J. David Dodd, III
Nichols, Jackson, Dillard, Hager & Smith, L.L.P.
1800 Lincoln Plaza
500 North Akard
Dallas, Texas 75201

OR99-1701

Dear Mr. Dodd:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code. Your request was assigned ID# 126951.

You assert that some of the requested information doesn't exist. The Public Information Act does not require a governmental body to make available information which does not exist at the time of the request. Open Records Decision No. 362 (1983).

You assert that section 552.103 of the Government Code excepts from disclosure the requested information. 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.

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(a) 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. *University of Tex.*

Law Sch. v. Texas Legal Found., 958 S.W.2d 479 (Tex. App.--Austin, 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 588 (1991). In this instance, you have made the requisite showing that the requested information relates to litigation for purposes of section 552.103(a).[1] The requested records therefore may be withheld from public disclosure.

We note that if the opposing party in the litigation has seen or had access to any of the information in these records, there is no section 552.103(a) interest in withholding that information from the requestor. Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). However, if the records contain information that is confidential by law, you must not release such information even at the conclusion of the litigation. Gov't Code §§ 552.101, .352.

In light of our conclusion under section 552.103(a), we need not address the applicability of other exceptions, if any. We are resolving this matter with this 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 may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,

Ruth H. Soucy
Assistant Attorney General
Open Records Division

RHS/eaf

Ref.: ID# 126951

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[1]If a governmental body submits to this office a "representative sample" of the requested records, we assume that the sample submitted is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). When a representative sample of the requested information is submitted to this office, the open records letter ruling does not reach, and therefore does not authorize the withholding of any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Encl: Submitted documents

cc: Ms. Michelle P. Hutton
2809 Vail Drive
McKinney, Texas 75070
(w/o enclosures)