



February 24, 2000

Ms. Sara Shiplet Waitt
Senior Associate Commissioner
Legal and Compliance Division
Texas Department of Insurance
P O Box 149104
Austin, Texas 78714-9104

OR2000-0680

Dear Ms. Waitt:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 132421.

The Texas Department of Insurance (the “department”) received a request from an attorney on behalf of Provident Communications, Inc. and Provident Trade Company for information “regarding [the department’s] investigation of Provident Communications, Inc., Provident Trade Company and/or James Cargile in connection with Mr. Cargile’s sale of whole life insurance policies on behalf of National Guardian Life Insurance Company” from January 1, 1998 to December 6, 1999. You indicate that some of the information responsive to the request will be provided to the requestor.¹ You explain that other responsive information, related to the department’s Insurance Fraud Unit, has been withheld in accordance with Open Records Letter No. 95-1536 (1995).² You have provided for our review additional responsive information, which you assert is excepted from disclosure under section 552.103

¹ We thus assume you have released this information to the requestor.

² Information is excepted from required disclosure pursuant to section 5(a) of article 1.10D of the Insurance Code, and the department need not seek a ruling from this office with reference to such information, where (1) the information was acquired by the department or reveals information that was acquired by the department, (2) the information is relevant to an inquiry by the insurance fraud unit, and (3) the Commissioner of Insurance decides the information must remain confidential to complete the investigation, protect the person under investigation from unwarranted injury, or serve the public interest. *See* Open Records Decision No. 608 (1992); Open Records Letter No. 95-1536 at 2 (1995). *See also* Ins. Code art. 1.10D, § 5(a).

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. *See* Gov’t Code § 552.103. To show that section 552.103(a) is applicable, the department must demonstrate 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, 481 (Tex. App.--Austin 1997, no pet.); *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 at 4 (1990). To demonstrate that litigation is reasonably anticipated, the department must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). You state:

The Enforcement Section of the Legal and Compliance Division has two pending cases regarding this matter. One case is against James Cargile and this other is against Provident Communications. Even though the cases are intertwined they are being pursued as two separate cases. Some of the information sought by [the requestor] includes documents obtained by [the department] from James Cargile. TDI does not currently wish to release this information to [Provident Communications].

We thus conclude that litigation is reasonably anticipated in this instance. We additionally find the information at issue relates to the reasonably anticipated litigation for the purposes of section 552.103(a). *Texas Legal Found.*, 958 S.W.2d at 483. We note, however, that if any opposing party in the anticipated litigation has seen or had access to the information at issue, there is no section 552.103(a) interest in withholding such information from the requestor. Open Records Decision Nos. 349 (1982), 320 (1982) (where a party to the litigation has obtained the information at issue, the purpose underlying the statutory predecessor to section 552.103 has been fully served and the exception is no longer applicable). Based on your representations, we assume the present requestor is anticipated to be a party in a separate cause of action from the individual who was the source of the documents at issue. You further state that the documents at issue have not been provided to Provident. Based on these representations, we agree you may withhold the information pursuant to section 552.103.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov’t Code § 552.301(f). If the

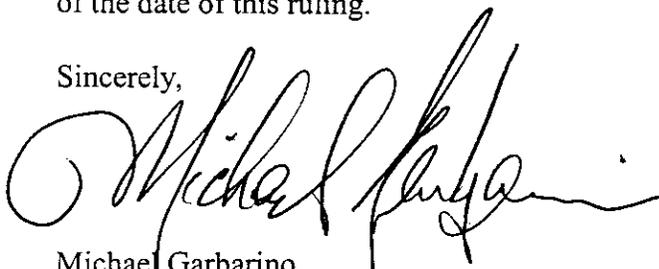
governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael Garbarino
Assistant Attorney General
Open Records Division

MG/jc

Ref: ID# 132421

Encl. Submitted documents

cc: Mr. Thomas A. Adams, IV
The Adams Law Firm
P. O. Box 127
Katy, Texas 77492-0127
(w/o enclosures)