



July 17, 2001

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

OR2001-3090

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# 149532.

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

- 1) names of the five companies that sell industrial life policies with which [the department] is negotiating settlements. Any open records, including commissioner's reports, pertaining to the companies, the value or number of policies entailed, the range of overpricing involved[.]
- 2) list of the 40 stipulated premiums companies who have been asked to complete the race-based pricing survey.

You state that the department provided information to the requestor in response to item two of the request. You also state that the department does not have any commissioner's reports responsive to the request.¹ You state that "[i]nformation regarding the value and number of the reports, and the range of overpricing is covered by a previous opinion from [this] office."

¹ We note that the Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

Finally, you claim that the identity of the five companies with which the department is engaged in settlement negotiations is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Section 552.103 of the Government Code provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature 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.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). Section 552.103 was intended to prevent the use of the Act as a method of avoiding the rules of discovery in litigation. Attorney General Opinion JM-048 at 4 (1989). The litigation exception enables a governmental body to protect its position in litigation by requiring information related to the litigation to be obtained through discovery. Open Records Decision No. 551 at 3 (1990). To show that section 552.103(a) is applicable, the department must demonstrate that (1) litigation was pending or reasonably anticipated on the date that the department received the request for information, and (2) the information at issue is related to that litigation. Gov't Code § 552.103(c); *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). Contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation under section 552.103. Open Records Decision No. 588 at 7 (1991). Section 552.103 requires concrete evidence that litigation may ensue. 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 that the department anticipates that it will initiate administrative litigation under the Texas Administrative Procedure Act against more than thirty insurance companies suspected of engaging in "race-based pricing" of certain life insurance policies. You explain that in preparation for this litigation, the department has sought information from these

insurance companies through written inquiries pursuant to section 38.001 of the Insurance Code. You state that after reviewing and analyzing the responses received from these insurance companies, the department began settlement negotiations with five of these companies. You further state that “[t]he fact that [the department] is negotiating with a specific company and information acquired during the course of the negotiations is relevant to the anticipated litigation against the other companies involved in race-based pricing,” and that “[the department’s] selection of companies with which to negotiate would reveal [the department’s] strategy in connection with the anticipated administrative litigation against each of the companies that participated in race-based pricing.” Based on your representations and our review of the submitted information, we find that you have adequately shown that the department reasonably anticipates litigation for the purposes of section 552.103 and that the submitted information relates to the anticipated litigation.

We note that 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, and such information must be disclosed. Open Records Decision Nos. 349 (1982), 320 (1982). Here, you state that “[a]lthough each of the five companies have been privy to the fact that [the department] is negotiating with that company, none of the five companies have been privy to the identity of any other company with which [the department] is negotiating,” and that “none of the other companies against which [the department] anticipates litigation has been privy to the identity of the five companies with which [the department] is negotiating.” You argue that “[i]n order to protect [the department’s] position in the litigation, the identity of the five companies with which [the department] is negotiating should be withheld from disclosure.” Based on your arguments, we agree that although each of the five insurance companies with which the department is negotiating knows that the department is negotiating with that company, the department continues to have a litigation interest in the identity of these five insurance companies, as this information has not been obtained by all the parties to the anticipated litigation. Therefore, the department may withhold the submitted information under section 552.103. However, the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We now address your contention that the requested information “pertaining to the companies, the value or number of policies entailed and the range of overpricing involved” is covered by a previous ruling from this office. You state that “[a]ny information [the department] possesses regarding this information was provided to [the department] in the survey responses that were the subject of [Open Records Letter No. 2001-1816 (2001)].” A review of our records indicates that this office previously ruled on the survey responses received from insurance companies suspected of engaging in “race-based pricing” in Open Records Letter No. 2001-1816 (2001) and allowed the department to withhold that information under section 552.103. Further, we have concluded that the department continues to anticipate litigation against insurance companies suspected of engaging in “race-based pricing.” Therefore, as the four criteria for a “previous determination” established by

this office in Open Records Decision No. 673 (2001) have been met, the department may withhold the information “pertaining to the companies, the value or number of policies entailed, [and] the range of overpricing involved” in accordance with Open Records Letter No. 2001-1816 (2001).²

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).

²The four criteria for this type of “previous determination” are 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code; 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the attorney general’s prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling. *See* Open Records Decision No. 673 (2001).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

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,



Karen A. Eckerle
Assistant Attorney General
Open Records Division

KAE/sdk

Ref.: ID# 149532

Enc.: Submitted documents

c: Mr. Aissatou Sidime
Banking, Insurance & Personal Finance Writer
San Antonio Express News
P.O. Box 2171
San Antonio, Texas 78297-2171
(w/o enclosures)