



May 2, 2002

Mr. Shelby Rogers
General Counsel
State Bar of Texas
P.O. Box 12487
Austin, Texas 78711-2487

OR2002-2299

Dear Mr. Rogers:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 162071.

The State Bar of Texas (the "state bar") received a request to review the advertising case files of a named attorney. You inform us that the state bar has made all responsive information available to the requestor with the exception of a single document, which you claim 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 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.

Section 552.103(a) was intended to prevent the use of the Public Information Act as a method of avoiding the rules of discovery in litigation.¹ Attorney General Opinion JM-1048

¹ The Public Information Act is not a substitute for the discovery process under the Texas Rules of Civil Procedure. *See* Attorney General Opinion JM-1048 at 3 (1989) ("the fundamental purposes of the Public Information Act and of civil discovery provisions differ"); Open Records Decision No. 551 (1990) at 4-5 (discussion of relation of Public Information Act to discovery process).

at 4 (1989). To secure the protection of section 552.103, a governmental body has the burden of providing relevant facts and documents to show that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is or may be a party. Open Records Decision No. 588 at 1 (1991) The test for meeting this burden is a showing that (1) litigation to which the governmental body is or may be a party is pending or reasonably anticipated at the time the request is received, 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). The state bar must meet both prongs of this test for information to be excepted under 552.103(a).

You have submitted to this office a petition for a pending lawsuit against the Unauthorized Practice of Law Committee (“UPLC”) that was filed prior to the receipt of the request for information. The state bar is not a named party to that suit. Nevertheless, you contend that “[a]lthough the UPLC is not a State Bar committee, the two entities have a symbiotic relationship.” In an attempt to illustrate this relationship, you cite sections of the Government Code that require the UPLC to keep the state bar apprized of the unauthorized practice of law and that provide that all of the UPLC’s expenses are to be paid out of the state bar’s budget. Gov’t Code §§ 81.104(1)(A) (UPLC required to keep state bar informed regarding unauthorized practice of law by lay persons and lay agencies); 81.103(f) (“All necessary and actual expenses of the [UPLC] should be provided for and paid out of the budget of the state bar.”) On the basis of these representations, we understand you to assert that the state bar is functionally, if not nominally, a party to this suit.

In general, case law supports the proposition that in certain situations entities may function as parties even when not named as such. *See, e.g., Ex parte Foster*, 188 S.W.2d 382, 384 (1945) (courts ruling on res judicata issue look beyond nominal parties and treat all those whose interests are involved in litigation and who conduct and control the action or defense as real parties and hold them concluded by any judgment rendered). In particular, when an entity is not itself being sued but bears financial responsibility for any judgment rendered against the named party, the entity bearing responsibility is looked upon as a real party in interest to the litigation. *See New Caney Indep. Sch. Dist. Bd. Of Trustees v. Burnham Autocountry, Inc.*, 960 S.W.2d 957, 959 (Tex. App.—Texarkana 1998) (citing *Cavers v. Sioux Oil & Refining Co.*, 39 S.W.2d 862, 867-68 (Tex. Comm’n App. 1931, holding approved)).

As noted above, the state bar will bear financial responsibility in the event judgment is rendered against the UPLC. Under these circumstances, and based on well-settled case law, we conclude that the state bar has shown that it is a real party to litigation that was pending at the time it received this request for information. In addition, we find that the submitted information is related to the pending suit. Accordingly, the state bar may withhold this information under section 552.103 of the Government Code.

We note, however, 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. 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. Further, 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).

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).

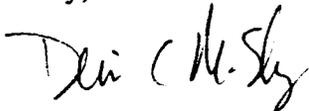
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/seg

Ref: ID# 162071

Enc. Submitted documents

c: Mr. Pete T. Patterson
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(w/o enclosures)