



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

July 31, 2003

Ms. Mary Barrow Nichols
Senior Vice President and General Counsel
Texas Mutual Insurance Company
221 West 6th Street, Suite 300
Austin, Texas 78701-3403

OR2003-5289

Dear Ms. Nichols:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 185251.

The Texas Mutual Insurance Company ("Texas Mutual") received a request for the following categories of information: 1) two performance evaluations, 2) "[k]udos" given to the requestor, 3) correspondence between the requestor and a specified secretary regarding the status of the requestor's lumbar/back support, 4) a specified warning, 5) the engineers ergo reports, and 6) the duties of the requestor's position and the physical requirements of the position. You inform us that no annual performance evaluations exist; however, Texas Mutual will release a quarterly review to the requestor. Texas Mutual previously provided the requestor with information responsive to category four. You advise us that Texas Mutual does not possess information responsive to categories two and three of the request. You assert the remaining categories of information are excepted from disclosure under section 552.103 of the Government Code. We acknowledge our receipt of comments submitted by the requestor's representative, as permitted by the Act. *See Gov't Code § 552.304* (permitting interested third party to submit comments explaining why information should or should not be released). We reviewed the information you submitted and considered the exception you claim.

Initially, we note that the Act does not require a governmental body to disclose information that does not exist at the time a request is received or to create new information in response

to a request. *See 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).

You state Texas Mutual has not located information responsive to category two of the request. Further, with respect to category three, you explain that Texas Mutual keeps computerized backups of its Lotus Notes e-mail files for thirteen months and the requestor's employment ceased at Texas Mutual eighteen months ago. Therefore, based on your representations, Texas Mutual has no obligation under the Act to respond to categories two and three of the request for information.

Also, we note section 552.022 of the Government Code governs some of the submitted information. This provision delineates several categories of information that are not excepted from required disclosure unless they "are expressly confidential under other law." In pertinent part, this section reads as follows:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(15) information regarded as open to the public under an agency's policies[.]

Gov't Code § 552.022(a)(15). The submitted information contains a job description, which is usually open to the public as part of a job posting. If Texas Mutual regards this information as open to the public, then Texas Mutual may withhold this information only to the extent it is made confidential under other law or is otherwise protected by section 552.108 of the Government Code. Texas Mutual claims section 552.103, a discretionary exception, which does not constitute other law for the purposes of section 552.022. *See* Open Records Decision Nos. 663 (1999) (governmental body may waive section 552.103), 473 (1987); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Accordingly, Texas Mutual may not withhold the position description under section 552.103 of the Government Code if it is information Texas Mutual regards as open to the public. Otherwise, we will consider your section 552.103 claim.

Last, we address your claim under section 552.103 of the Government Code. Section 552.103 states, in pertinent part, as follows:

(a) Information is excepted from the requirements of Section 552.021 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). To secure the protection of section 552.103(a), Texas Mutual must demonstrate the requested information "relates" to pending or reasonably anticipated litigation. Open Records Decision No. 588 (1991). Texas Mutual has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing the applicability of section 552.103(a) requires a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. 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.).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.¹ Open Records Decision No. 555 (1990); see Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). This office has ruled that litigation was reasonably anticipated when an attorney, who had been hired, made a demand for disputed payments and threatened to sue if the payments were not made promptly. Open Records Decision No. 346 (1982).

You state that the requestor, "through his attorney, has notified Texas Mutual of his intent to sue" Further, you have submitted two letters as supporting documentation to establish litigation was reasonably anticipated as of the date Texas Mutual received the request for information. We note that Texas Mutual received the request for information on May 14, 2003, yet, you partially rely on a letter dated May 28, 2003 to establish that Texas Mutual reasonably anticipated litigation. As Texas Mutual received this letter after it

¹ In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, see Open Records Decision No. 336 (1982); and threatened to sue on several occasions and hired an attorney, see Open Records Decision No. 288 (1981).

received the request for information, we find this letter provides no basis for establishing prong one of the litigation exception. However, we find the letter dated November 28, 2002 supports Texas Mutual's contention that it reasonably anticipated litigation on the date it received the request for information. In this letter, opposing counsel threatens to pursue claims under the Deceptive Trade Practices Act and the Insurance Code. Based on our review of your arguments and the submitted information, we conclude Texas Mutual has met its burden of establishing that litigation was reasonably anticipated on the date Texas Mutual received the present request and the information relates to the anticipated litigation. Therefore, Texas Mutual may withhold the submitted information under section 552.103 of the Government Code.

In reaching this conclusion, we assume the opposing party has not had access to or seen any of the information at issue. Generally, once all parties to the litigation have obtained information, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Further, the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, Texas Mutual must release the submitted job description under section 552.022(a)(15) if it is information that Texas Mutual regards as open to the public. If not, Texas Mutual may withhold the job description and the remaining submitted information under section 552.103 of the Government Code.

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 Dep't of Pub. 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,



Christen Sorrell
Assistant Attorney General
Open Records Division

CHS/seg

Ref: ID# 185251

Enc: Submitted documents

c: Mr. Patrick Pridgen
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Addison, Texas 75001
(w/o enclosures)