



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 25, 2005

Ms. Piper Smith
Open Records Liaison
Manufactured Housing Division
Texas Department of Housing and Community Affairs
P.O. Box 12489
Austin, Texas 78711-2489

OR2005-07721

Dear Ms. Smith:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 230024.

The Manufactured Housing Division of the Texas Department of Housing and Community Affairs (the "division") received a request for all investigation records concerning a named individual, a specified manufactured housing business, and a second named individual who owns a second specified company. You state that closed complaint files related to the named individuals and businesses are being made available to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code.¹ In addition, we have received arguments from the Office of the Attorney General (the "OAG") contending that the submitted information is excepted from disclosure under section 552.103 of the Government Code. *See Gov't Code § 552.304* (any person may submit written comments stating why information at issue in request for attorney

¹ Although you also assert the attorney-client privilege under section 552.101, the proper exception for the attorney-client privilege is section 552.107. *See Open Records Decision No. 676 at 6 (2002)*. Further, although you raise section 552.111 of the Government Code, you have submitted no arguments in support of withholding information under this section. Thus, you have waived this exception. *See Gov't Code §§ 552.301, .302.*

general decision should or should not be released). We have considered all claimed exceptions and reviewed the submitted representative sample of the requested information.²

Initially, we must address the division's obligations under the Act. Pursuant to section 552.301(b), a governmental body must ask the attorney general for a decision as to whether requested information must be disclosed not later than the tenth business day after the date of receiving the written request for information. *See* Gov't Code § 552.301(b). You acknowledge, and the submitted information reflects, that the division received the initial request for information on May 16, 2005. You advise that the division asked the requestor to clarify her request on May 20, 2005. *See* Gov't Code § 552.222; *see also* Open Records Decision No. 31 (1974) (stating that when governmental bodies are presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed). Thus, the ten business day time period to request a decision from us under section 552.301(b) was tolled on the date that the division sought clarification of the request from the requestor. *See* Gov't Code § 552.301(b); *see also* Open Records Decision No. 663 at 5 (1999) (providing that ten-day period is tolled during the clarification process). You advise, and have provided documentation showing, that the division received the requestor's clarification on May 25, 2005. Accordingly, we conclude that the ten business day time period for requesting a decision from our office resumed on May 26, 2005. The division did not request a decision from this office until June 8, 2005. Consequently, we conclude that the division failed to comply with the procedural requirements of section 552.301 of the Government Code in requesting this decision from us.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released, unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to section 552.302); Open Records Decision No. 319 (1982). Generally, a governmental body may demonstrate a compelling reason to withhold information by a showing that the information is made confidential by another source of law or affects third party interests. *See* Open Records Decision No. 630 (1994). Sections 552.103 and 552.107 are discretionary exceptions under the Act and may be waived by the governmental body. Thus, these exceptions, when raised by the division, do not demonstrate compelling reasons to withhold information from the public. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex.

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter 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.

App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general), 542 at 4 (1990) (statutory predecessor to Gov't Code § 552.103 may be waived). The division has, therefore, waived its claims under sections 552.103 and 552.107. However, the need of a governmental body, other than the entity that failed to timely comply with procedural requirements of the Act, may, in appropriate circumstances, be a compelling reason for non-disclosure. See Open Records Decision No. 586 (1991) (need of another governmental body to withhold information under Gov't Code § 552.108 may provide compelling reason for non-disclosure when governmental body that received request failed to timely seek open records decision under Gov't Code § 552.301). In this instance, the OAG asserts that the release of the submitted records will harm its litigation interests. We find that the OAG's assertion of its interest in having the requested information withheld under section 552.103 constitutes a compelling demonstration sufficient to overcome the heightened presumption of openness. See *id.*; see also Open Records Decision Nos. 469 (1987) (university may withhold information under Gov't Code § 552.103 predecessor to protect district attorney's interest in anticipated criminal litigation), 121 (1976) (same).

Section 552.103 of the Government Code provides in relevant part 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). A governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) that the information at issue is related to that litigation. *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *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.); see also Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. See Open Records Decision No. 647 at 2 (1996).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). When the governmental body is the prospective plaintiff in litigation, the evidence of anticipated litigation must at least reflect that litigation involving a specific matter is “realistically contemplated.” *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (investigatory file may be withheld if governmental body’s attorney determines that it should be withheld pursuant to Gov’t Code § 552.103 and that litigation is “reasonably likely to result”).

The OAG advises that, prior to the division’s receipt of the instant request, the OAG’s Consumer Protection Division received a referral from the division to investigate and take appropriate legal action against certain named individuals and entities, including those identified in the instant request for information. The OAG further explains that, in furtherance of the investigation, in March 2004, the division requested that the OAG file suit against certain lenders and manufacturers “to bring enforcement action against the entire spectrum of the manufactured housing industry [and] to bring statewide protection to consumers against unlicensed sales practices” utilized by the company specified in the instant request, as well as others. The OAG further advises that, pursuant to provisions of the Texas Deceptive Trade Practices-Consumer Protection Act, negotiations then ensued between the potential defendants and the OAG in order to craft an Agreed Permanent Injunction or an Assurance of Voluntary Compliance, and that finalization of these documents, as well as the drafting of litigation pursuant to this investigation, is pending. The OAG also states that the requested information relates to this impending lawsuit. After reviewing the OAG’s arguments and the submitted records, we conclude that the requested information relates to the OAG’s anticipated litigation. Thus, the OAG has demonstrated the applicability of section 552.103. Therefore, the division may withhold the submitted g information pursuant to section 552.103 of the Government Code.

However, 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 all the opposing parties 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).

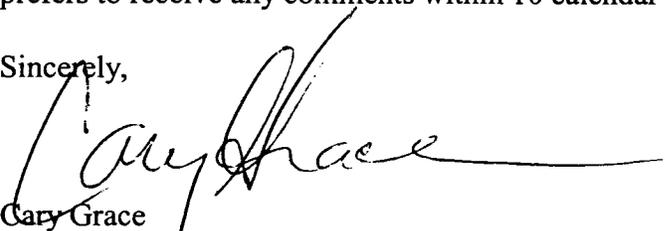
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,



Cary Grace
Assistant Attorney General
Open Records Division

ECG/sdk

Ref: ID# 230024

Enc. Submitted documents

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