



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 22, 2005

Mr. Chris Kadas
General Counsel
Texas Department of Licensing and Regulation
P. O. Box 12157
Austin, Texas 78711

OR2005-08642

Dear Mr. Kadas:

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# 232929.

The Texas Department of Licensing and Regulation (the "department") received a request for information regarding a specific talent agency. You claim that the requested information 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). 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. *See 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. *Id.* Contested cases conducted under the Administrative Procedure Act (the “APA”), chapter 2001 of the Government Code, are considered litigation for purposes of section 552.103. *See* Open Records Decision No. 588 at 7 (1991).

You state that the department has begun two investigations into alleged violations of the Occupations Code, and indicate that these investigations were pending on the date that the department received the request for information. You further state that upon completion of the investigations, the department intends to seek administrative penalties and/or license sanctions against the respondent and that you anticipate taking part in contested case hearings before the State Office of Administrative Hearings. Based on these representations, we conclude that litigation was reasonably anticipated at the time the department received the request for information. Further, upon review of the submitted information, we conclude that it is related to the anticipated litigation. Therefore, you may generally withhold the submitted information under section 552.103 of the Government Code.

We note, however, that the opposing party in the pending litigation already has seen or had access to much of the information at issue. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that relates to the litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). If the opposing party already has seen or had access to information that relates to the litigation, through discovery or otherwise, then there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, the department may withhold the submitted information at this time under section 552.103, provided that the opposing party in the pending litigation has not already seen or had access to any of the information. We further note that the applicability of section 552.103 to this information ends at the conclusion of the related litigation. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

To the extent that the submitted information may not be withheld under section 552.103, we address the public availability of the information. We note that section 552.136 of the Government Code is applicable to some of this information.¹ This section states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card,

¹Unlike other exceptions to disclosure, this office will raise mandatory exceptions such as sections 552.136 and 552.137 on behalf of a governmental body, because chapter 552 of the Government Code prescribes criminal penalties for the release of confidential information. *See* Gov’t Code §§ 552.007, .352; Open Records Decision No. 325 at 2 (1982).

or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. The department must, therefore, withhold the marked bank account and credit card numbers under section 552.136.

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). See Gov’t Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee’s work e-mail address because such an address is not that of the employee as a “member of the public” but is instead the address of the individual as a government employee. The e-mail addresses that we have marked do not appear to be of a type specifically excluded by section 552.137(c). You do not inform us that any member of the public to whom an e-mail address at issue pertains has affirmatively consented to the release of the e-mail address. The department must, therefore, withhold the e-mail addresses we have marked under section 552.137 of the Government Code.

In summary, the department may withhold the submitted information under section 552.103, provided that the opposing party in the pending litigation has not already seen or had access to any of the marked information. To the extent the submitted information is not excepted under section 552.103, the department must withhold the marked information under sections 552.136 and 552.137. The rest of the submitted information must be released.

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); *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 Office of the Attorney General 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/krl

Ref: ID# 232929

Enc. Submitted documents

c: Mr. Les Henderson
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POM 1B0
(w/o enclosures)