



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 9, 2005

Mr. W. Thomas Godard
Assistant General Counsel
Texas Department of State Health Services
1100 West 49th Street
Austin, Texas 78756

OR2005-11066

Dear Mr. Godard:

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# 237780.

The Texas Department of State Health Services (the "DSHS") received a request for twenty categories of information pertaining to a lawsuit involving the DSHS and the requestor. You state that the DSHS will release some of the requested information, and that the DSHS does not have information responsive to some of the requested items.¹ The DSHS claims, however, that the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered your claimed exception to disclosure and have reviewed the submitted information.

Initially, you inform us that the DSHS asked the requestor to clarify certain portions of the request for information. We note that a governmental body may communicate with a requestor for the purpose of clarifying or narrowing a request for information. *See Gov't Code § 552.222(b)*; Open Records Decision No. 663 at 2-5 (1999). You state that the DSHS has not received a response to its request for clarification. Accordingly, we find that the

¹Chapter 552 of the Government Code does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App. – San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

DSHS has no obligation at this time to release any information that may be responsive to those portions of the request for information. Please note, however, that if the DSHS receives a response to its request for clarification and wishes to withhold any information to which the requestor seeks access, the DSHS must request another decision. *See Gov't Code §§ 552.301, 552.302.*

Section 552.103, the litigation exception, 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). The governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date that the request for information was received, 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, 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 governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

The DSHS explains that prior to the receipt of the written request the Office of the Attorney General (the "OAG") filed suit on behalf of the DSHS, formerly known as the Texas Department of Health, against Utopia Silver, Inc. and its previous and current owners. The currently pending lawsuit was filed in the 201st District Court of Travis County and alleges Utopia's practices are in violation of the Deceptive Trade Practices Act; the Texas Food, Drug and Cosmetic Act; and other related consumer protection statutes. We note that the DSHS is one of the OAG's client agencies and that the OAG is providing legal counsel to the DSHS in this matter. After reviewing your arguments and the submitted information, we conclude that litigation is pending, and the submitted information is related to the litigation. Therefore, the DSHS may withhold the submitted information pursuant to section 552.103(a).

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). 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); *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,



James Forrest
Assistant Attorney General
Open Records Division

JF/segh

Ref: ID# 237780

Enc. Submitted documents

c: Mr. Ben Taylor
P.O. Box 444
Utopia, Texas 78884
(w/o enclosures)