



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 13, 2006

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

OR2006-00485

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# 240279.

The Texas Department of Housing and Community Affairs - Manufactured Housing Division (the "division") received a request for the entire complaint file for a named individual. You indicate that some of the requested information will be released to the requestor. You claim that portions of the requested information are excepted from disclosure under sections 552.101, 552.107, and 552.116 of the Government Code. 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 general decision should or should not be released). We have considered all claimed exceptions and reviewed the submitted information.

Initially, we note that a portion of the submitted information is subject to required public disclosure under section 552.022 of the Government Code. Section 552.022 provides in relevant part:

- (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:

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). The information we have marked consists of information in a voucher relating to the expenditure of funds by a governmental body. Thus, pursuant to section 552.022(a)(3), the division may only withhold the information at issue if it is confidential under other law. Sections 552.103, 552.107, and 552.116 of the Government Code are discretionary exceptions to disclosure that protect the governmental body's interests and are therefore not other law that make information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions); *see* Gov't Code § 552.302; Open Records Decision No. 630 at 4-5 (1994) (governmental body may waive statutory predecessor to section 552.107). Consequently, the division may not withhold the information we have marked that is subject to section 552.022 under section 552.103, 552.107 or 552.116 of the Government Code.

We now address the OAG's arguments under section 552.103 for the remaining submitted information. 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 section 552.103 and that litigation is “reasonably likely to result”).

The OAG advises that it provides general counsel and litigation services to the division. The OAG states that the information at issue pertains to a complaint and investigation related to payment of a claim from the manufactured homeowner’s recovery trust fund under Texas Occupation Code (the “Code”), Chapter 1201, Subchapter I. When claims are paid against a license holder, section 1201.409 of the Code requires that the surety on the license holder’s bond reimburse the fund. In this case, the surety has refused payment. The Code, section 1201.409 further states, “If payment to the trust fund of a claim is not made by the surety or from other security in a timely manner, the attorney general shall file suit for recovery of the amount due the trust fund.” Therefore, we find that litigation was reasonably anticipated when the request was received. After reviewing the OAG’s arguments and the submitted records, we conclude that the requested information relates to the OAG’s anticipated litigation. The OAG states that release of the requested information will harm the OAG’s litigation interests. Thus, the OAG has demonstrated the applicability of section 552.103. Therefore, the division may generally withhold the submitted 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).

In summary, the division must release the information we have marked pursuant to section 552.022(a)(3) of the Government Code. To the extent that the remaining information at issue has not been seen by the opposing party, it may be withheld pursuant to

section 552.103 of the Government Code.¹ The information that has been seen by the opposing party may not be withheld under section 552.103 of the Government Code and must be released to the requestor.²

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).

¹As our ruling is dispositive, we need not address the remaining arguments.

²We note that the information being released contains information relating to the requestor's client that would be excepted from disclosure to the general public under law and exceptions designed to protect privacy. However, as the authorized representative of the individual at issue, the requestor has a special right of access to this information. See Gov't Code § 552.023(b) (governmental body may not deny access to person to whom information relates, or that person's representative, solely on the grounds that information is considered confidential by privacy principles). If the division receives a future request for this information from a person other than the requestor or his authorized representative, the division should again seek our decision.

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/er

Ref: ID# 240279

Enc. Submitted documents

c: Mr. Alan J. Harlan
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(w/o enclosures)