



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 14, 2007

Mr. Paul A. Lamp
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OR2007-02856

Dear Mr. Lamp:

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# 273932.

The Pasadena Independent School District (the "district"), which you represent, received a request for sixteen categories of information pertaining to district health care insurance and claim administration services. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. You also state, and have provided documentation showing, that you notified the following companies of the district's receipt of the request for information and of the right of each to submit arguments to this office as to why the requested information should not be released to the requestor: Aetna; Barmore Insurance Agency, Inc.; Benefit & Compensation Specialists, PLLC; BlueCross BlueShield of Texas; Gilsbar, Inc.; Health Administration Services ("HAS"); Humana Health Plan, Inc. ("Humana"); TML Intergovernmental Employee Benefits Pool; and UnitedHealthcare. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). Aetna, HAS, Humana, and UnitedHealthcare assert that some of the requested information is excepted under sections 552.101, 552.104, and 552.110 of the Government Code. We have reviewed the submitted arguments and information.

Initially, we note that some of the requested information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2007-00032 (2007). With regard to information in the current request that is identical to the information previously requested and ruled upon by this office, we conclude that, as we have no

indication that the law, facts, and circumstances on which the prior ruling was based have changed, the district must continue to rely on that ruling as a previous determination and withhold or release this information in accordance with Open Records Letter No. 2007-00032. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

We note that some of the submitted information consists of completed reports that are subject to required public disclosure under section 552.022 of the Government Code. Section 552.022(a)(1) states that a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it is excepted under section 552.108 of the Government Code or is expressly confidential under other law.¹ Although you claim this information is excepted from disclosure under section 552.103 of the Government Code, this is a discretionary exception that protects the governmental body's interests and may be waived. *See* Gov't Code § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 663 (1999) (governmental body may waive section 552.103); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the district may not withhold any of the information subject to section 552.022 under section 552.103. As you raise no other exceptions to disclosure of this information, and it is not otherwise confidential by law, the district must release the information that is subject to section 552.022. We have marked this information accordingly.

We next address your section 552.103 claim for the remaining information not subject to section 552.022. Section 552.103 of the Government Code provides in relevant part:

(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

¹The district does not raise section 552.108 as an exception to 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 was pending or reasonably anticipated when the governmental body received the request for information, 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).

In order 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). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* In Open Records Decision No. 638 (1996), this office stated that a governmental body has met its burden of showing that litigation is reasonably anticipated when it received a notice of claim letter and the governmental body represents that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act (“TTCA”), chapter 101 of the Texas Civil Practice and Remedies Code, or an applicable municipal ordinance.

You inform us, and provide documentation showing, that prior to the receipt of the present request, the district received a notice of claim from the requestor concerning a claim for damages. You represent that this notice complies with the requirements to make a claim for damages against the district under the TTCA. Based on your representations and our review of the submitted documentation, we find that you have demonstrated that the district reasonably anticipated litigation on the date of its receipt of this request for information. Furthermore, we find that the remaining information is related to the anticipated litigation for purposes of section 552.103(a). Therefore, the remaining information may be withheld under section 552.103.

Generally, 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). In this instance, we note that the opposing party has seen some of the information at issue. Thus, the information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and 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).

Accordingly, with regard to information in the current request that is identical to the information previously requested and ruled upon by this office, the district must continue to rely on our prior ruling as a previous determination and withhold or release this information in accordance with Open Records Letter No. 2007-00032. The district must release the information that is subject to section 552.022 of the Government Code. The district may generally withhold the remaining submitted information under section 552.103 of the Government Code; however, the information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and must be disclosed.² As our ruling is dispositive, we do not address the remaining arguments.

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).

²We note that some of the information marked for release contains or consists of confidential information that is not subject to release to the general public. See Gov't Code § 552.352. However, the requestor in this instance has a special right of access to the information. Gov't Code § 552.023. Because some of the information is confidential with respect to the general public, if the district receives a future request for this information from an individual other than the requestor, the district should again seek our decision.

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/eb

Ref: ID# 273932

Enc. Submitted documents

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