



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 7, 2008

Ms. Zindia T. Thomas
Assistant Attorney General
Public Information Coordinator
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2008-06263

Dear Ms. Thomas:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 309441.

The Office of the Attorney General (the "OAG") received a request for information pertaining to its investigation of "the Wild Animal Orphanage ('WAO') aka and dba American Sanctuary Association of the United States . . . and related entities and owners/operators." The OAG states it will release some of the responsive information. However, the OAG seeks to withhold the remaining information from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code.¹ We have

¹The OAG asserts the information is protected under section 552.101 of the Government Code in conjunction with the attorney-client privilege pursuant to Texas Rule of Evidence 503 and the attorney work product privilege pursuant to Texas Rule of Civil Procedure 192.5. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. It does not encompass the discovery privileges found in these rules because they are not constitutional law, statutory laws, or judicial decisions. Open Records Decision No. 676 at 1-2 (2002). The OAG's reliance on *In re City of Georgetown* is misplaced because the court addressed the interplay between the discovery privileges and section 552.022 of the Government Code, not section 552.101. 53 S.W.2d 328 (Tex. 2001).

considered the OAG's claimed exceptions to disclosure and have reviewed the submitted sample of information.²

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 OAG has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in this 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 is 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 OAG must meet both prongs of this test for information to be excepted under section 552.103(a).

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").

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.

In this instance, the OAG states its Charitable Trusts Section of the Consumer Protection and Public Health Division is currently investigating WAO for potential violations of the Texas Deceptive Trade Practices-Consumer Protection Act and the Texas Non-Profit Corporation Act. The OAG further states this investigation antedated the request for information, may result in litigation, and was undertaken for that purpose. The OAG also states the information relates to this anticipated lawsuit. After reviewing the OAG's arguments and the submitted records, we conclude the requested information relates to the OAG's anticipated litigation. Thus, the OAG may withhold some of the information under section 552.103.³ Because section 552.103 is dispositive of the information in Exhibit D, we do not address the OAG's other arguments for Exhibit D.

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 the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. We note that except for the one letter we marked, the OAG provided the letters in Exhibit B to the opposing party and the OAG obtained Exhibit C from the opposing party. Accordingly, the OAG may not withhold this information under section 552.103.

Next, we consider the OAG's argument that the information not excepted under section 552.103 is confidential under section 552.101 in conjunction with section 17.61 of the Business and Commerce Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information that another statute makes confidential. Section 17.61(f) of the Business and Commerce Code provides:

(f) No documentary material produced pursuant to a demand under this section, unless otherwise ordered by a court for good cause shown, shall be produced for inspection or copying by, nor shall its contents be disclosed to any person other than the authorized employee of the office of the attorney general without the consent of the person who produced the material. The office of the attorney general shall prescribe reasonable terms and conditions allowing the documentary material to be available for inspection and copying by the person who produced the material or any duly authorized representative of that person. . . .

Bus. & Com. Code § 17.61(f). This provision requires the OAG to withhold from required public disclosure all documentary material the OAG obtained pursuant to a Civil Investigative Demand ("CID"). After reviewing the information, we conclude only Exhibit

³Further, 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).

C is confidential under section 17.61(f). The CIDs in Exhibit B are not confidential because they are not documentary materials produced pursuant to a demand. Thus, because the OAG does not assert any other exceptions for the CIDs that we have not marked, the OAG must release them.

In summary, the OAG must withhold Exhibit C pursuant to section 17.61(f) of the Business and Commerce Code. The OAG may withhold the letter we marked in Exhibit B and Exhibit D in its entirety under section 552.103 of the Government Code. The OAG must release the remainder of Exhibit B.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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).

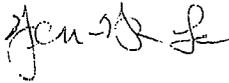
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/sdk

Ref: ID# 309441

Enc: Marked documents

c: Ms. Joan Byron-Marasek
P.O. Box 101
Clarksburg, New Jersey 08510
(w/o enclosures)