



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 10, 2009

Ms. Cynthia Villarreal-Reyna
Section Chief, Agency Counsel
Legal Services Division MC 110-1A
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2009-01768

Dear Ms. Villarreal-Reyna:

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# 334759 (TDI # 84738).

The Texas Department of Insurance (the "department") received a request for information relating to complaints regarding a named individual. You state that some of the requested information has been released. You claim that the rest of the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, 552.130, 552.136, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the information you submitted.

We first note that some of the submitted information was created after the date of the department's receipt of this request for information. The Act does not require a governmental body to release information that did not exist when it received a request or create responsive information.¹ Accordingly, the submitted information that did not exist

¹See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

when the department received this request is not responsive to the request. This decision does not address the public availability of the non-responsive information, which we have marked, and the department need not release that information to the requestor in response to this request.

Next, we address your claim for the remaining information under section 552.103 of the Government Code, which is the most inclusive exception you raise. Section 552.103 provides in 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 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 that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated 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.). 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. 551 at 4 (1990).*

To establish that litigation is reasonably anticipated for the purposes of section 552.103, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *See Open Records Decision No. 452 at 4 (1986).* The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect that litigation is "realistically contemplated." *See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (finding that investigatory file may be withheld if governmental body attorney determines that it should be withheld pursuant to*

section 552.103 and that litigation is “reasonably likely to result”). We note that a contested case under the Administrative Procedure Act (the “APA”), chapter 2001 of the Government Code, constitutes “litigation” for the purposes of section 552.103. *See* Open Records Decision No. 588 at 7 (1991) (addressing statutory predecessor to APA).

You explain, and have provided an affidavit stating, that the responsive information is related to an anticipated enforcement action that the department intends to initiate against the named insurance agent under section 4005.101 of the Insurance Code. You inform us that the department compiled the information at issue in anticipation of and in connection with the prospective litigation. You also state that the investigation is ongoing. We note that section 4005.101 authorizes the department to discipline a license holder who is determined to have willfully violated an insurance law of this state. *See* Ins. Code § 4005.101(b)(1). Based on your representations, the submitted affidavit, and our review of the information at issue, we find that the information is related to litigation that the department reasonably anticipated on the date of its receipt of this request for information. We therefore conclude that the department may withhold the responsive information under section 552.103 of the Government Code.²

We note that 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 is related to litigation through discovery procedures. *See* ORD 551 at 4-5. You state that the responsive information has not been viewed by all of the parties to the anticipated litigation. Once all of the opposing parties have seen or had access to information relating to anticipated or pending litigation, through discovery or otherwise, there is no longer any interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We also note that the applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

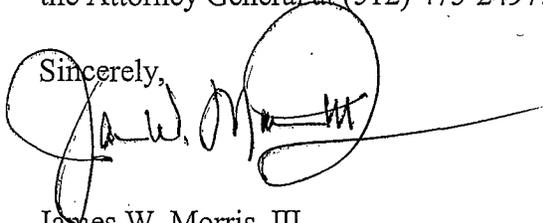
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General’s Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public

²As we are able to make this determination, we do not address your other arguments against disclosure.

information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is written in a cursive style with a long horizontal stroke extending to the right. There are two circular scribbles or marks above the signature, one on the left and one on the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/cc

Ref: ID# 334759

Enc: Submitted documents

c: Requestor
(w/o enclosures)