



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 27, 2009

Mr. Reg Hargrove
Assistant Attorney General
Public Information Coordinator's Office
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2009-07195

Dear Mr. Hargrove:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 343038 (PIR Nos. 09-024383 and 09-024428).

The Office of the Attorney General (the "OAG") received requests for information pertaining to civil investigative demand letters concerning Baptist St. Anthony's Health System ("BSA"), documents provided to the OAG in response to such demand letters, and correspondence from BSA or the OAG's internal memoranda discussing the handling of the investigation. The OAG states it will release some of the information but asserts the remainder is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, and 552.147 of the Government Code. We have considered the OAG's arguments and have reviewed the submitted sample of information.¹ We have also received and considered BSA's comments. *See* Gov't Code § 552.304 (interested party may submit written comments concerning availability of requested information).

¹We 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.

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").

In this instance, the OAG states it is currently investigating BSA for potential violations of antitrust laws. 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 Exhibit D and the information it marked in Exhibit C relate to this anticipated lawsuit. After reviewing the OAG's arguments and the submitted records, we conclude Exhibit D and the information the OAG marked in Exhibit C relate to the anticipated litigation. Thus, the OAG may withhold the information under section 552.103. Because section 552.103 is dispositive of this information, we do not address the OAG's other arguments.

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. Further, the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Next, the OAG asserts Exhibit F and the remainder of Exhibit C are protected from disclosure under section 552.101 in conjunction with section 15.10(i) 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 15.10(i) provides:

(1) Except as provided in this section or ordered by a court for good cause shown, no documentary material, answers to interrogatories or transcripts of oral testimony, or copies or contents thereof, shall be available for examination or used by any person without the consent of the person who produced the material, answers, or testimony and, in the case of any product of discovery, of the person from whom the discovery was obtained.

Bus. & Com. Code § 15.10(i)(1). The OAG is allowed to release the information only in a limited number of circumstances, as outlined in section 15.10(i). The OAG states Exhibit F and the remainder of Exhibit C were produced in response to a civil investigative demand issued under section 15.10 and none of the permissive exceptions are applicable. In addition, BSA states it does not consent to release of the information it provided in response to a civil investigative demand. After reviewing the information, we agree the OAG must withhold the information under section 15.10(i). Because section 15.10 is dispositive, we do not address the OAG's other arguments for this information.

In summary, the OAG may withhold Exhibit D and the information it marked in Exhibit C under section 552.103. Also, the OAG must withhold Exhibit F and the remainder of Exhibit C under section 15.10(i) of the Business and Commerce Code.

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

Sincerely,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/sdk

Ref: ID# 343038

Enc: Submitted documents

c: 2 Requestors
(w/o enclosures)

Mr. William R. Pakalka
Counsel to BSA Enterprises, Inc.
Fulbright & Jaworski, L.L.P.
1301 McKinney, Suite 5100
Houston, Texas 77010-3095
(w/o enclosures)