



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 16, 2012

Mr. Mike Powell
Managing Attorney
Office of the Secretary of State
P.O. Box 12697
Austin, Texas 78711-2697

OR2012-02462

Dear Mr. Powell:

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# 445670.

The Office of the Secretary of State (the "Secretary's Office") received four requests from the same requestor for all correspondence during a specified time period between a specified individual and the National Collegiate Athletic Association, the University of Texas, and two named individuals which contains a reference to each or any of three other named individuals and a named entity. You state the Secretary's Office does not have any information responsive to a portion of the request.¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.103 of the Government Code provides, in relevant part:

(a) Information is excepted from [required public disclosure] if it is

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

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 to show that the section 552.103(a) exception applies in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the requested information is related to that litigation. *See 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 parts of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

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) (finding 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”). For purposes of section 552.103(a), this office considers a contested case under the Texas Administrative Procedure Act (“APA”), Government Code chapter 2001, to constitute “litigation.” Open Records Decision No. 588 at 7 (1991) (construing statutory predecessor to the APA).

You explain the Secretary's Office is authorized to investigate and enforce the provisions of chapter 2051 of the Occupations Code, regarding the regulation of athlete agents. *See* Occ. Code § 2051.051. You state chapter 2051 authorizes the Secretary's Office to issue a preliminary report assessing administrative penalties against an athlete agent who violates the provisions of that chapter. *See id.* §§ 2051.451, .452. You explain that the athlete agent may request a contested case hearing conducted pursuant to the APA to contest the alleged violation or the amount of the penalty assessed in the preliminary report. *See id.*

§§ 2051.453, .454. In this instance, you explain that the submitted information relates to an ongoing investigation into possible violations of chapter 2051 of the Occupations Code for which litigation, in the form of a contested case hearing, is anticipated. Based on your arguments and our review of the submitted information, we conclude you have shown that litigation was reasonably anticipated when the Secretary's Office received the request for information, and that the submitted information relates to the anticipated litigation. Therefore, you may withhold the submitted information under section 552.103 of the Government Code.²

We note the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Once the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, then there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Such information is not excepted from disclosure under section 552.103(a) and must be disclosed. The applicability of section 552.103(a) also ends once the litigation has been concluded or is no longer reasonably anticipated. 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 information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Sean Nottingham
Assistant Attorney General
Open Records Division

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²Because our ruling is dispositive, we do not address your remaining arguments against disclosure.

Ref: ID# 445670

Enc. Submitted documents

c: Requestor
(w/o enclosures)