



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 24, 2013

Mr. Nick Lealos
Office of Agency Counsel
Legal Section
General Counsel Division
Texas Department of Insurance
P.O. Box 149104, MC 110-1a
Austin, Texas 78714-9104

OR2013-12770

Dear Mr. Lealos:

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# 494371 (TDI# 138066).

The Texas Department of Insurance (the "department") received a request for e-mail communications between specified individuals during a specified period of time and two specified documents.¹ You state you have released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.103

¹We note the department asked for and received clarification regarding this request. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *see City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). Next, you inform us the department provided the requestor with an estimate of charges and a request for a deposit for payment of those charges on May 2, 2013. *See* Gov't Code §§ 552.2615, .263(a). You state the department received a deposit for payment of the anticipated costs on May 8, 2013. Thus, May 8, 2013 is the date on which the department is deemed to have received the request. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on the date the governmental body receives deposit or bond).

and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, you indicate some of the requested information may have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2013-08656 (2013). In that decision, we ruled the department may withhold the information marked under sections 552.103 and 552.111 of the Government Code and must release the remaining information. As we are unaware of any change in the relevant law, facts, and circumstances on which the previous ruling was based, then to the extent the requested information is identical to the information at issue in that ruling, we conclude the department may rely on Open Records Letter No. 2013-08656 as a previous determination and withhold or release such information in accordance with that ruling. *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). To the extent the requested information is not encompassed by the prior ruling, we will consider the exceptions you claim.

Section 552.103 of the Government Code provides 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). A 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 on the date 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). A governmental body must meet both

prongs of this test for information to be excepted under section 552.103(a). We note contested cases conducted under the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code, are considered litigation for purposes of section 552.103. *See* Open Records Decision No. 588 at 7 (1991). We further note a contested case before the State Office of Administrative Hearings (the "SOAH") is considered litigation for the purposes of the APA. *See id.*

You state, and submit documentation demonstrating, the information at issue is related to a pending enforcement case before SOAH between the department and a department windstorm inspector. You explain the department alleges the inspector violated provisions of the Administrative and Insurance Codes in the inspection and certification of certain structures. We note the requestor is the former department director of windstorm inspections. You state that after the requestor separated from employment with the department, he contacted the inspector's attorney in the pending enforcement action and made allegations concerning the credibility of inspections performed by the department and offered to testify against the department. You explain the e-mails at issue relate to the credibility and objectivity of department windstorm inspectors and could be used as rebuttal or cross examination evidence. Based on your representations and our review, we determine litigation was pending on the date the department received the request for information. Furthermore, we find the submitted information relates to the pending litigation. Accordingly, we find the department may withhold the information at issue under section 552.103 of the Government Code.²

We note once information has been obtained by all parties to the pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the pending 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 been concluded. 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.texasattorneygeneral.gov/open_orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for

²As our ruling on this information is dispositive, we need not address your remaining argument against its disclosure.

providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in cursive script that reads "Paigelay".

Paige Lay
Assistant Attorney General
Open Records Division
PL/bhf

Ref: ID# 494371

Enc. Submitted documents

cc: Requestor
(w/o enclosures)