



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

October 16, 2015

Ms. Lauren Downey
Assistant Attorney General
Public Information Coordinator
General Counsel Division
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2015-21720

Dear Ms. Downey:

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# 585555 (OAG PIR No. 15-42163).

The Office of the Attorney General (the "OAG") received a request for Civil Investigation Demands ("CIDs") and Requests to Examine Documents issued during a specified time period by certain divisions of the OAG. You state the OAG will release some of the requested information. Additionally, you state the OAG will withhold some of the responsive information pursuant to Open Records Letter No. 2012-08540 (2012).¹ You claim the remaining requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹In Open Records Letter No. 2012-08540 this office issued the OAG a previous determination authorizing it to withhold information it compiles in connection with a Medicaid fraud investigation under section 552.101 of the Government Code in conjunction with section 531.1021(g) of the Government Code without the need of requesting a ruling from this office when requests for such information are not made by individuals or entities who are authorized to obtain such information under chapter 531 of the Government Code.

²This letter ruling assumes the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent the other information is substantially different than that submitted to this office. *See* Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

Section 552.101 of the Government Code 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 other statutes make confidential. You raise section 15.10(i)(1) of the Business and Commerce Code, which reads as follows:

(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). You explain section 15.10(b) of the Business and Commerce Code authorizes the OAG to issue a Civil Investigative Demand (“CID”) when the attorney general has reason to believe any person may be in possession, custody, or control of any documentary material or may have information relevant to a civil antitrust investigation. *Id.* § 15.10(b). You assert portions of the information in Exhibit B, which you have marked, consist of information provided to the OAG in response to a CID issued by the Antitrust Section of the OAG’s Consumer Protection Division. You state none of the permitted disclosures in section 15.10(i) apply in this instance. After review of the information at issue and consideration of your arguments, we agree the OAG must withhold the information you have marked in Exhibit B under section 552.101 in conjunction with section 15.10(i)(1).

Section 552.103 of the Government Code 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 governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is 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, orig. proceeding); *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 prongs of this test for information to be excepted from disclosure under section 552.103(a).

To establish litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect litigation 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 attorney determines it should be withheld pursuant to section 552.103 and litigation is “reasonably likely to result”). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. See ORD 452 at 4.

You state some of the information in Exhibit B pertains to pending litigation involving the OAG. You state, and provide documentation showing, litigation styled *State of Texas v. Joel Molano* was pending in the Hidalgo County District Court, 92nd Judicial District at the time of the instant request for information. Based on these representations, we agree the OAG was a party to pending litigation when you received the present request for information.

Further, you state some of the information in Exhibit B pertains to anticipated litigation involving the OAG. You explain that some of the information pertains to a civil investigation being conducted by the OAG’s Consumer Protection Division into possible violations by certain Planned Parenthood facilities of the Texas Health and Safety Code, the Texas Administrative Code, and the Texas Business and Commerce Code relating to the possible unlawful trafficking of fetal tissue in the State of Texas. Further, you state some of the information consists of CIDs issued by the OAG in instances where the OAG’s Consumer Protection Division is investigating anticompetitive activity in violation of the Texas Free Enterprise and Antitrust Act of 1983. Finally, you state some of the information consists of CIDs related to investigations of possible violations of the Texas Deceptive Trade Practices and Consumer Protection Act. You state these investigations are initiated for enforcement purposes, and if violations are uncovered, the OAG will initiate enforcement proceedings. Based on these representations, we agree the OAG reasonably anticipated litigation regarding these matters when you received the present request for information.

Upon review of your arguments and the information at issue, we find the OAG has also established the information at issue relates to the pending and reasonably anticipated litigation. Accordingly, the OAG has demonstrated the applicability of section 552.103 of the Government Code to the information at issue. Thus, the OAG may withhold the information you have marked in Exhibit B on that basis.

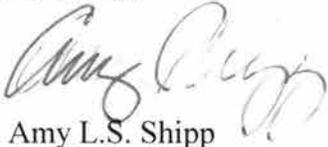
However, once the information has been obtained by all parties to the anticipated or pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

In summary, the OAG must withhold the information you have marked in Exhibit B under section 552.101 of the Government Code in conjunction with section 15.10(i)(1) of the Business and Commerce Code. The OAG may withhold the information you have marked in Exhibit B under section 552.103 of the Government Code. The OAG must release the remaining information.

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

Sincerely,



Amy L.S. Shipp
Assistant Attorney General
Open Records Division

ALS/cz

Ref: ID# 585555

Enc. Submitted documents

c: Requestor
(w/o enclosures)