



December 1, 1999

Ms. Katherine Minter Cary
Assistant Attorney General
Office of the Attorney General
P. O. Box 12548
Austin, Texas 78711-2548

OR99-3459

Dear Ms. Cary:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 129764.

The Office of the Attorney General (the "OAG") received a request for several categories of documents pertaining to various responsibilities of the OAG, including the issuance of civil investigative demands (CID) and the Texas tobacco case. You explain that you have clarified with the requestor which specific documents are sought. Gov't Code § 552.222; Open Records Decision No. 663 (1999). You indicate that much of the requested information has been released to the requestor, including all materials responsive to the categories of information you identify as 2, 4, 5, 6, 7, 8, and 9. You claim that certain documents sought under categories 1 and 3 are excepted from disclosure by sections 552.101, 552.103, 552.107, 552.108, and 552.111. You have provided a representative sample of the information you seek to withhold under categories 1 and 3 as Exhibits 4-10.¹ You also contend that no documents exist that are responsive to the information sought in request categories 10 and 11. The Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986).

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.

We will address your contention under section 552.108 of the Government Code for Exhibit 10 first. You explain that some of the requested information in items 1 and 3 is subject to an ongoing federal investigation and was shared with federal authorities. This office has previously concluded that these exact same records at issue here are excepted from required public disclosure pursuant to section 552.108 of the Government Code because the information "relates to an investigation being conducted by . . . the FBI and the United States Attorney." Open Records Letter No. 99-2636 (1999); *see also* Open Records Letter Nos. 99-2383 (1999), 99-2372 (1999), 99-2362 (1999), 99-2337 (1999), 99-2310 (1999), OR99-1841 (1999). Both of these entities have requested that this information be withheld because release at this time would interfere with the ongoing investigation. *See* Gov't Code § 552.108(a)(1). Consequently, we issued a previous determination concerning these records, finding that the attorney general need not seek a decision from this office for future requests until such time that the federal criminal investigation has been concluded. Open Records Letter No. 99-3218 (1999). You represent that the federal investigation is ongoing. Accordingly, you may rely on Open Records Letter No. 99-3218 to withhold the requested information that is the subject of the ongoing federal investigation and which the federal authorities have asked that you withhold. Further, the attorney general need not seek a decision from this office for future requests for this information until such time that the federal criminal investigation has been concluded.

You claim that information responsive to request item 1, Exhibits 4 and 5, are protected from disclosure by section 552.103. The information consists of CIDs issued by the Office of the Attorney General. Section 552.103(a) excepts from disclosure information:

- (a) ... 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.
- (b) For purposes of this section, the state or a political subdivision is considered to be a party to litigation of a criminal nature until the applicable statute of limitations has expired or until the defendant has exhausted all appellate and postconviction remedies in state and federal court.
- (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.

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 is pending or reasonably anticipated at the time of the request, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas 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 552.103(a).

You argue that the CIDs at issue here are related to anticipated litigation. You explain that they were issued pursuant to the OAG's enforcement authority and all were issued as part of an active investigation that remains ongoing. See Bus. & Com. Code § 17.61. You state that "[a]ll of these investigations are ongoing, and based on the facts obtained to date, it appears that in each case there is a reasonable likelihood that the conduct being investigated would violate the DTPA. Therefore, at some future time, the OAG is reasonably likely to initiate litigation to stop and/or punish these violators. We believe that you have established that litigation was reasonably anticipated at the time of the request in the situations you describe. See Open Records Decision No. 557 (1990). The requested information additionally relates to the anticipated litigation. *Texas Legal Found.*, 958 S.W.2d at 483 ("Ordinarily, the words 'related to' mean 'pertaining to,' 'associated with' or 'connected with.'").

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). You contend in this instance, however, that there are three types of CIDs involved in this request: those issued to third parties that will not be parties in the anticipated litigation, those issued to some but not all potential opposing parties, and those issued to all known potential opposing parties but where there could be additional opposing parties. You state that at this point in the investigation, "it is impossible to determine whether all opposing parties have had access to the requested information." You explain that in this investigative context, potential violators or opposing parties may be discovered during the process. Based upon your arguments and representations, we find that in this case you may withhold all of the requested CIDs that you have submitted and describe. We point out, however, that 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).

You finally claim that responsive information to request 3, Exhibits 6-9, are excepted from disclosure, *iter alia*, by section 552.107 of the Government Code as confidential attorney client communications. Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this

office concluded that section 552.107 excepts from public disclosure only “privileged information,” that is, information that reflects either confidential communications from the client to the attorney or the attorney’s legal advice or opinions; it does not apply to all client information held by a governmental body’s attorney. *Id.* at 5. We find that you may withhold the information in Exhibits 6-9 under section 552.107. Because we make a determination under sections 552.107 and 552.108 for Exhibits 6-10, we need not address your additional arguments against disclosure for this information.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,

A handwritten signature in black ink that reads "Don Ballard". The signature is written in a cursive, slightly slanted style.

Don Ballard
Assistant Attorney General
Open Records Division

JDB/ljp

Ref: ID# 129764

Encl. Submitted documents

cc: Mr. Robert Bryce
The Austin Chronicle
P. O. Box 49066
Austin, Texas 78765
(w/Open Records Letter No. 99-3218 (1999))