



December 28, 1999

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

OR99-3794

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# 130657.

The Office of the Attorney General (the Attorney General) received a request for the Public Information Coordinator's file number 99-5525. You indicate that you have released the entire file to the requestor, "with the exception of the attachments of representative samples that were filed with the original request for ruling in file number 99-5525 (ID# 129635)." You explain that the prior request for a decision was withdrawn by operation of law. You claim that the submitted samples of information, which were subject to the prior request, are excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. You have submitted the samples of information you seek to withhold as Exhibits D through J. We have considered the exceptions you claim and reviewed the submitted samples of information.¹

You claim that responsive information submitted as Exhibits D through L is protected from disclosure by section 552.103. Exhibits D through J consist of the OAG's litigation files from its different divisions. The information was the subject of the request in ID# 129635,

¹In reaching our conclusion here, we 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.

which was later withdrawn by operation of law. *See* Gov't Code § 552.2615(b). 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).

Although we previously found in Open Records Letter No. 99-2664 (1999) that litigation was not reasonably anticipated under similar circumstances, you now fully explain that the draft petition was sent to the Office of the Attorney General by the requestor, specifically to the First Assistant Attorney General. You have also now demonstrated how and why litigation is reasonably anticipated. *See* Open Records Decision No. 638 (1996). You state that the requestor has made several complaints of non-compliance with the Public Information Act to the Attorney General. The requestor has, in this instance, presented the Attorney General with a draft petition naming Attorney General Cornyn as the defendant. Although the requestor now states that "[t]he requestor will be the judge of why he sent [the draft petition]," you argue that litigation can be reasonably anticipated. You indicate that the requestor has proceeded to litigation *pro se* in at least one other occasion and that the

requestor's "lawsuit is more than just threatened; it was drafted and delivered to the Texas Attorney General." You have provided us with a copy of the draft petition against the Attorney General and the requestor's complaint of non-compliance dated December 6, 1999. The complaint alleges, among other matters, non-compliance with Open Records Letter No. 99-2664 (1999), which concerns the requestor and the Attorney General's efforts in regard to his complaints. The draft petition additionally alleges several areas of non-compliance with the Public Information Act, including the efforts made on behalf of the requestor. The petition specifically seeks mandamus relief, the award of costs, and all other relief available. We find that you have demonstrated anticipated litigation in this case. *Texas Legal Found*, 958 S.W.2d at 481.

You next state that the requestor intends to sue the Attorney General for the handling of his requests. The draft petition states as much in items 7 - 9 and 146 - 147. After review of the submitted information, we believe that it is related 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.'"). You may withhold the requested information in Exhibits D - J under section 552.103.

Generally, 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 been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Because we make a determination under section 552.103, we need not address your additional arguments against disclosure at this time. This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



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Assistant Attorney General
Open Records Division

MJB/YHL/ljp

Ref: ID# 130657

Encl. Submitted documents

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