



April 6, 2000

Ms. Daisy A. Stiner  
Executive Director  
Texas Department of Housing and Community Affairs  
P.O. Box 13941  
Austin, Texas 78711-3941

OR2000-1323

Dear Ms. Stiner:

You ask whether certain information is subject to required public disclosure under the Public Information Act, chapter 552 of the Government Code (the "Act"). Your request was assigned ID# 133752.

The Texas Department of Housing and Community Affairs (the "department") received a request for information pertaining to Al/Tex Homes, Inc. ("Al/Tex"), dba Southern Energy Homes of Texas, Inc. ("Southern"), for the period from August 26, 1999, through the date of the request. The requestor seeks: (1) correspondence, information, and documentation pertaining to Al/Tex, dba Southern; (2) complaints filed against Southern and records of any actions taken by the department in response; (3) administrative action letters sent to Southern by the department; and (4) a list of consumer complaint inspections conducted by the department on homes manufactured by Southern. You inform us that the department has identified thirteen consumer complaint files that are responsive to the request. You state that five closed files have been made available to the requestor. You claim that eight other files, which remain open pending investigation and resolution, are excepted from disclosure under section 552.103 of the Act. We have considered the exception you claim and have reviewed the information you submitted.

Initially we address your representation that the department does not maintain a list of consumer complaint inspections by manufacturer and your statement that "[i]n order to comply with [the] request for a list ... the [d]epartment would have to compile and extract information from numerous complaint files, a process not required by the Public Information Act." We agree that the Act does not require a governmental body that receives a request for information to make available information that does not exist or to prepare new information. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App. – San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 362 at 2 (1983). However, the Act does require the governmental body to relate

the request to information that it holds. *See* Open Records Decision No. 87 at 5 (1975); Gov't Code § 552.353 (providing penalties for failure to permit access to public information). In this instance, you indicate that information responsive to the request, including the requested information relating to consumer complaint inspections, is contained in the five complaint files that you have released to the requestor and the eight files that you submitted to this office in connection with your request for this ruling. Having reviewed the submitted complaint files, we are satisfied that they contain information relating to inspections and the other matters specified by the requestor and therefore would appear to be responsive to her request.

You seek to withhold the submitted files under section 552.103 of the Act. As amended by the Seventy-sixth Legislature, section 552.103, the "litigation exception," provides in relevant part:

(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). To sustain a claim under section 552.103, a governmental body must establish: (1) that litigation is either pending or reasonably anticipated and (2) that the information in question relates to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App. – Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. – Houston [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). Both prongs of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.* A contested case under chapter 2001 of the Government Code constitutes litigation for the purposes of section 552.103. *See* Open Records Decision No. 588 at 7 (1991).

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). To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* In this instance, you inform us that the eight complaint files that the department seeks to withhold relate to unresolved consumer complaints. You explain that such complaints are

investigated by the department and frequently result in the issuance of notices of violations and administrative hearings under section 2306.604 of the Government Code. You further explain that the contents of the files in question represent the department's potential evidence in prospective contested cases. We note that a proceeding under section 2306.604 of the Government Code is subject to the Administrative Procedure Act, chapter 2001 of the Government Code. *See* Gov't Code § 2306.604(r). Therefore, based on your representations and our review of the submitted complaint files, we conclude that they relate to anticipated litigation for the purposes of section 552.103.

We note, however, that much of the information contained in the submitted complaint files appears to have been disclosed previously to Al/Tex, Southern, or another prospective opposing party to anticipated litigation. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing a party seeking information relating to that litigation to obtain it through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). Therefore, to the extent that such a prospective party to anticipated litigation has seen or had access to any of the information in the submitted files, there is no interest in withholding that information from the public under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Additionally, section 552.103 is no longer applicable once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the department has demonstrated that the submitted complaint files relate to anticipated litigation under section 552.103. Therefore, information to which a prospective opposing party to anticipated litigation has not had access may be withheld. Information to which such a party has had access must be released to the requestor. 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).

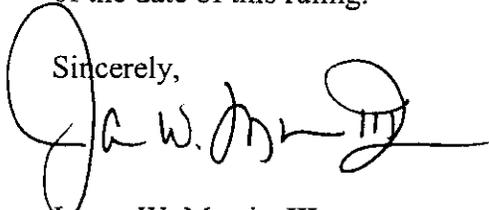
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is written in a cursive style with a large initial "J" and a long horizontal stroke at the end.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/ch

Ref: ID# 133752

Encl. Submitted documents

cc: Ms. Doreen Hickman  
Vice President  
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P.O. Box 187  
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(w/o enclosures)