



January 24, 2001

Ms. Sara Shiplet Waitt
Senior Associate Commissioner
Legal and Compliance, MC 110-1A
Texas Department of Insurance
P.O. Box 12548
Austin, Texas 78711-2548

OR2001-0277

Dear Ms. Waitt:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 143482.

The Texas Department of Insurance (the “department”) received a request for information submitted to the department by American National Insurance Company (“American National”) in response to the department’s inquiries regarding race-based insurance policies. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. Additionally, you assert that the requested records may contain proprietary information which is protected from disclosure under section 552.110 of the Government Code. You state that you have the department notified American National of the request for information pursuant to section 552.305 of the Government Code. *See* Gov’t Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov’t Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). We have considered the exception you claim and reviewed the submitted information.

To show that section 552.103(a) is applicable, the department must demonstrate that (1) litigation was pending or reasonably anticipated on the date that the department received the request for information, and (2) the information at issue is related to that litigation. Gov’t Code § 552.103(c); *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). Contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation under section 552.103. Open Records Decision No. 588 at 7 (1991). Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the department must furnish

evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

You state that the department anticipates initiating litigation under the Texas Administrative Procedure Act against American National and up to thirty-two other insurance companies which may have engaged in “race-based pricing” of certain life insurance policies. Furthermore, you explain that in preparation for this litigation, the department has sought information from the insurance companies through written inquiries pursuant to section 38.001 of the Insurance Code. Based on these representations, we find that you have adequately shown that the department reasonably anticipates litigation for the purposes of section 552.103. You also state that the submitted information consists of American National’s response to the department’s inquiry pursuant to section 38.001. Based on this statement as well as our review of the submitted information, we find that the information relates to the anticipated litigation. Therefore, the department has met its burden under section 552.103.

We note that 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 and such information must be disclosed. Open Records Decision Nos. 349 (1982), 320 (1982). Here, the information was generated, and consequently seen, by American National, one of the opposing parties to the anticipated litigation. However, you state that “the other companies against which litigation is anticipated have not had access to that information.” You explain further that the submitted information “is relevant not only to [the department’s] anticipated litigation against American National, but is also relevant to the administrative litigation against other companies that engaged in race-based pricing.” Based on your arguments, we agree that although American National has seen the submitted information, the department continues to have a litigation interest in the information as it has not been obtained by all the parties to the anticipated litigation. Therefore, the department may withhold the submitted information under section 552.103. However, the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).¹

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

¹Because section 552.103 is dispositive of this matter, we need not address whether American National has a proprietary interest in the submitted information.

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).

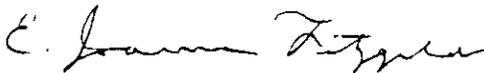
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

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,



E. Joanna Fitzgerald
Assistant Attorney General
Open Records Division

EJF/er

Ref: ID# 143482

Encl: Submitted documents

cc: Ms. Laura Elder
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