



December 11, 2001

Mr. Michael Greenberg  
Assistant General Counsel  
Texas Department of Health  
1100 West 49<sup>th</sup> Street  
Austin, Texas 78756-3199

OR2001-5770

Dear Mr. Greenberg:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 155964.

The Texas Department of Health (the "department") received a request for copies of a variety of documents pertaining to Town Talk Foods. You state that you have released or will release all responsive information that you believe not to be excepted from disclosure. You claim, however, that the submitted information is excepted from disclosure pursuant to section 552.103 of the Government Code. We have considered the exception you claim and have reviewed the submitted information.

Initially, we note that portions of the submitted information are subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108 ....

Gov't Code § 552.022(a)(1). The submitted information that we have marked constitutes completed investigations conducted by the department that are encompassed by section 552.022(a) and which, therefore, may only be withheld from disclosure to the extent that they are confidential under "other law" or are excepted from disclosure under section 552.108 of the Government Code. You claim that these investigations are excepted from disclosure pursuant to section 552.103 of the Government Code. However, section 552.103 is a discretionary exception under the Public Information Act and, therefore, is not "other law" for purposes of section 552.022.<sup>1</sup> Since you do not claim that these investigations are otherwise excepted from disclosure, you must release them to the requestor.

We also note that portions of the submitted information are printouts of publicly available information from the internet and newspaper clippings. Section 552.103 does not authorize the withholding of information which has already been made available to the public. *See* Open Records Decision No. 436 (1986). Accordingly, these printouts, which we have marked, must be released to the requestor regardless of whether they relate to litigation, since they already exist in the public domain by virtue of their publication.

You claim that the remaining submitted information is excepted from disclosure pursuant to section 552.103 of the Government Code. Section 552.103 provides in pertinent 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.

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<sup>1</sup> Discretionary exceptions are intended to protect only the interests of the governmental body as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

Gov't Code, § 552.103(a),(c). The department maintains 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 on the date that the governmental body receives the request for information and (2) the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *see also 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); Gov't Code § 552.103(c). The department must meet both prongs of this test for information to be excepted under section 552.103(a).

A governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture" when establishing that litigation is reasonably anticipated. *See* Open Records Decision No. 452 at 4 (1986). In the context of anticipated litigation by a governmental body, the concrete evidence must at least reflect that litigation is "realistically contemplated." *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (finding that investigatory file may be withheld if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is "reasonably likely to result"). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986).

You state, and provide documentation showing, that on September 13, 2001 the department requested that the Office of the Attorney General represent the department and file a civil suit against Town Talk Foods for alleged violations of state food and drug laws and department rules regarding the proper handling and storage of human food products under chapters 431 and 432 of the Health and Safety Code. Based on your arguments and our review of the remaining submitted information, we conclude that litigation was reasonably anticipated in this matter on the date that the department received the request and that the information at issue is related to the reasonably anticipated litigation for purposes of section 552.103.

However, 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.<sup>2</sup> *See* 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 may not be withheld from disclosure on that basis. We note that some of the remaining submitted information has been obtained from or provided to the potential opposing party in this matter. Therefore, you may not withhold this information from disclosure under section 552.103. However, with

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<sup>2</sup> Further, the applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

respect to the rest of the remaining submitted information, we conclude that the department may withhold this information from disclosure pursuant to section 552.103 of the Government Code.

In summary, the department must release to the requestor the section 552.022(a)(1) documents in the submitted information that we have marked. The department must also release to the requestor the printouts of information from the internet and newspaper clippings that we have marked. The department must also release to the requestor the documents in the submitted information that have been obtained from or provided to the potential opposing party in this matter. The remaining submitted information may be withheld from disclosure pursuant to section 552.103 of the Government Code.

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).

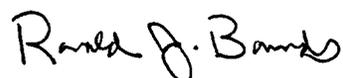
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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

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 Texas Building and Procurement 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,



Ronald J. Bounds  
Assistant Attorney General  
Open Records Division

RJB/seg

Ref: ID# 155964

Enc. Marked documents

cc: Mr. Mitch Mitchell  
Fort Worth Star-Telegram  
3201 Airport Freeway, Suite 108  
Bedford, Texas 76201  
(w/o enclosures)