



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

June 18, 2003

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

OR2003-4218

Dear Ms. Rabon:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 183084.

The Office of the Attorney General (the "OAG") received a request for information relating to the investigation of Kid-Care, Inc. by the Charitable Trusts Section of the Consumer Protection Division. Although you state that over 100 responsive pages of information will be released, you claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, and 552.137 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted sample information.¹

Section 552.103, the litigation exception, provides in relevant part as follows:

- (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

¹This letter ruling assumes that the submitted sample information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the OAG to withhold any information that is substantially different from the submitted information. See Gov't Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

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). The 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 on the date that the request for information was received, 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). The governmental body must meet both prongs of this test for information to be excepted under 552.103(a).

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). When the governmental body is the prospective plaintiff in litigation, the evidence of anticipated litigation must at least reflect that litigation involving a specific matter is "realistically contemplated." *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (investigatory file may be withheld if governmental body's attorney determines that it should be withheld pursuant to Gov't Code § 552.103 and that litigation is "reasonably likely to result").

In this instance, you state that the Charitable Trusts Section is currently investigating two corporations, the Kid-Care Food Program, Inc. and the We Care About Kids Kid-Care. You explain that these "investigations involve complaints regarding the corporations' diversion of non-profit charitable assets, alleged misappropriation of such assets for the benefit and private inurement of board members and employees, and violations of the Texas Non-Profit Corporation and the Deceptive Trade Practices Acts." You state that at the conclusion of your investigation, the Charitable Trusts Section will seek approval to file suit against Kid-Care, Inc. for breach of fiduciary duty. You state that the requested information relates to this impending lawsuit. After reviewing your arguments and the submitted records, we conclude that, for purposes of section 552.103, the requested information relates to the OAG's anticipated litigation

We note, however, that the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). Thus, when the opposing party has seen or had access to information relating to anticipated litigation, there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). In this instance, the opposing party has had access to some of the submitted records. Accordingly, while most of the responsive records may be withheld under section 552.103, any information that has been previously seen by the opposing party may not be withheld under this exception.² We will, therefore, address your additional arguments against disclosure for the remaining records.

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” This section encompasses information protected by other statutes. You represent that the remaining documents were obtained pursuant to Civil Investigative Demands (“CID”) issued under the Texas Deceptive Trade Practices-Consumer Protection Act, section 17.61 of the Texas Business and Commerce Code (the “DTPA”). Section 17.61 authorizes the OAG’s Consumer Protection Division to serve on a person it believes may be in possession of documentary material relevant to an investigation of a possible violation of the DTPA a CID requiring the person to produce the relevant material. Section 17.61(f) governs the release of CID materials and provides in pertinent part as follows:

(f) No documentary material produced pursuant to a demand under this section, unless otherwise ordered by a court for good cause shown, shall be produced for inspection or copying by, nor shall its contents be disclosed to any person other than the authorized employee of the consumer protection division without the consent of the persons who produced the material. The consumer protection division shall prescribe reasonable terms and conditions allowing the documentary material to be available for inspection and copying by the person who produced the material or any duly authorized representative of that person.

Bus. & Com. Code § 17.61(f). Although this provision generally requires the OAG to withhold from required public disclosure all documentary material it obtains pursuant to a CID, it specifically confers a special right of access to the person who produced the material or that person’s authorized representative. In this instance, the requestor is the authorized representative of Kid Care, Inc. Accordingly, we conclude that all CID materials submitted to the OAG by Kid Care, Inc. must be released to this requestor. *See generally* Open

²We also note that section 552.103 is no longer applicable once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Records Decision Nos. 544 (1990), 378 (1983) (concluding that information specifically made public by statute may not be withheld from public by any of Public Information Act's exceptions to public disclosure). All CID materials produced by other individuals and entities must be withheld under section 552.101.³

In summary, the OAG must release the CID information produced by the requestor's client. CID materials obtained from other parties must be withheld under section 552.101. The remaining information may be withheld under section 552.103.

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).

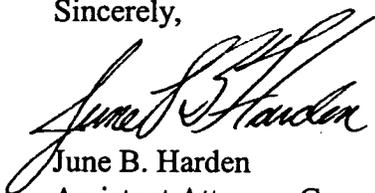
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

³ Because we are able to make a determination under sections 552.101 and 552.103, we need not address the applicability of your other claimed exceptions to disclosure.

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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/seg

Ref: ID# 183084

Enc: Submitted documents

c: Mr. Jay D. Hirsch
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(w/o enclosures)