



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 6, 2003

Mr. Brett Bray
Director, Motor Vehicle Division
Texas Department of Transportation
P.O. Box 2293
Austin, Texas 78768

OR2003-8015

Dear Mr. Bray:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 190630.

The Motor Vehicle Division of the Texas Department of Transportation (the "department") received two requests for information relating to complaints. The first request is for a list of all complaints filed under the Texas Lemon Law during a specified time interval. The second request is for the names and addresses of persons who filed complaints against any automotive dealership in the Houston Region during a specified time interval. You inform us that the department will release some of the requested information. You claim that the rest of the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you raise and have reviewed the information you submitted.

Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that another statute makes confidential. The department raises section 552.101 in conjunction with section 2301.612 of the Occupations Code. Section 2301.612 is found in subchapter M of chapter 2301 of the Occupations Code, "Warranties: Rights of Vehicle Owners." *See* Occ. Code § 2301.601 *et seq.* Section 2301.612 provides as follows:

Information filed with the [Motor Vehicle Board of the department] under this subchapter is not a public record and is not subject to release under Chapter 552, Government Code, until the complaint is finally resolved by order of the board.

Id. § 2301.612.¹ You indicate that the information that is encompassed by the first request relates to complaints filed with the motor vehicle board of the department under subchapter M of chapter 2301 of the Occupations Code. You seek to withhold the names and addresses of the complainants. You indicate that some of these complaints have been resolved by the board. Having considered your arguments, we conclude that the names and addresses of persons who filed complaints with the motor vehicle board under subchapter M of chapter 2301 of the Occupations Code from July 1, 2003 through the date of the department's receipt of the first request for information are confidential under section 2301.612, to the extent that such names and addresses actually were filed with the board and relate to complaints that remained unresolved on the date of the department's receipt of the first request. The information that is confidential under section 2301.612 of the Occupations Code is excepted from disclosure under section 552.101 of the Government Code. Any information that is responsive to the first request and that is not confidential under section 2301.612 is not excepted from disclosure and must be released to the requestor. *See also* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express, and confidentiality requirement will not be implied from statutory structure), 649 at 3 (1996) (language of confidentiality provision controls scope of its protection), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to public).

Next, we address your claim under section 552.103 of the Government Code. This exception provides in 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). The governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must

¹Formerly V.T.C.S. art. 4413(36), § 6.07(l). *See* Act of May 22, 2001, 77th Leg., R.S., ch. 1421, § 5, 2001 Tex. Gen. Laws 4570, 4962 (adopting Occ. Code tit. 14, Regulation of Motor Vehicles and Transportation).

demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) that the information at issue is related 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 [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

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.* When the prospective plaintiff in the anticipated litigation is the governmental body that received the request for information, 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”).

You indicate that the second request for information encompasses the names and addresses of persons who filed complaints with the motor vehicle board under subchapter E of chapter 2301 of the Occupations Code. *See* Occ. Code § 2301.204(c). You inform us that the information that you seek to withhold under section 552.103 of the Government Code relates to investigations of such complaints by the board. *See id.* § 2301.203. You indicate that these investigations remain open. You explain that such an investigation can result in the commencement of a contested case. *See* Occ. Code § 2601.203(b). We note that a contested case under the Administrative Procedure Act, chapter 2001 of the Government Code, constitutes litigation for purposes of section 552.103 of the Government Code. *See* Open Records Decision No. 588 at 7 (1999). Based on your representations, we conclude that you have demonstrated that the department reasonably anticipated litigation with respect to those complaint investigations that remained open on the date of the department’s receipt of the second request for information. We also find that the requested names and addresses of the complainants relate to the anticipated litigation, to the extent that such names and addresses relate to complaints that were the subject of open investigations on the date of the department’s receipt of the second request. We therefore conclude that the requested names and addresses of complainants that relate to open investigations are excepted from disclosure at this time under section 552.103.²

²We note that information relating to a completed investigation made of, for, or by a governmental body is subject to required disclosure under section 552.022(a) of the Government Code and may not be withheld from the public under section 552.103. *See* Gov’t Code § 552.022(a)(1); *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov’t Code § 552.103); Open Records Decision No. 542 at 4 (1990) (governmental body may waive statutory predecessor to Gov’t Code § 552.103).

In reaching this conclusion, we assume that the opposing parties in the anticipated litigation have not seen or had access to any of the information that the department seeks to withhold under section 552.103. The purpose of this exception is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). If the opposing party to anticipated litigation has seen or had access to information relating to the litigation, through discovery or otherwise, then there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Furthermore, the applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the names and addresses of persons who filed complaints with the motor vehicle board under subchapter M of chapter 2301 of the Occupations Code from July 1, 2003 through the date of the department's receipt of the first request for information must be withheld from disclosure under section 552.101 of the Government Code in conjunction with section 2301.612 of the Occupations Code, to the extent that such names and addresses actually were filed with the board and relate to complaints that remained unresolved when the department received the first request. The names and addresses of complainants whose complaints were still the subject of open investigations under section 2301.203 of the Occupations Code when the department received the second request for information are excepted from disclosure at this time under section 552.103 of the Government Code. Any other information that is responsive to either of these requests is not excepted from public disclosure and must be released.

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

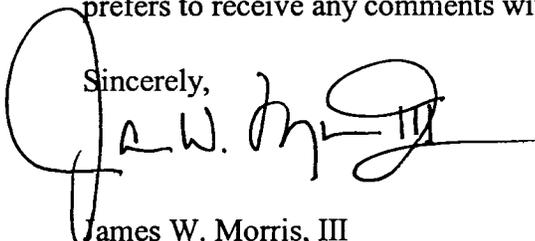
governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge 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).

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,

A handwritten signature in black ink, appearing to read "J.W. Morris III", with a large, stylized initial "J" on the left side.

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

JWM/sdk

Ref: ID# 190630

Enc: Submitted documents

c: Mr. Mark L. Aschermann
3730 Kirby Drive, #520
Houston, Texas 77098
(w/o enclosures)