



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 14, 2005

Mr. Steve Aragon
Chief Counsel
Texas Health and Human Services Commission
P.O. Box 13247
Austin, Texas 78711

OR2005-05228

Dear Mr. Aragon:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 225170.

The Texas Health and Human Services Commission (the "commission") received a request for all e-mail correspondence between certain current or former commission employees and Accenture, Inc. ("Accenture").¹ You claim that the requested information is excepted from disclosure pursuant to section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Section 552.103 of the Government Code provides 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 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

¹ We note your assertion that the requestor has withdrawn the portion of his request pertaining to e-mail correspondence between the commission and BTC Consultants.

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). A 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 was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). Contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation for purposes of section 552.103. *See* Open Records Decision No. 588 at 7 (1991).

To establish that litigation is reasonably anticipated, a governmental body must provide this office concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.² Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You state that the commission reasonably anticipated litigation concerning the requested information on the date the commission received this request. You inform us that the commission "announced the tentative award of the Integrated Eligibility and Enrollment Services contract to Accenture, IBM's competitor." You state that the commission received notice from IBM that "IBM intended to file a formal protest of the tentative contract award"

² In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

under the Administrative Procedures Act. Additionally, you inform us that IBM went on to state that it “reserves the right to seek appropriate judicial review of the [commission’s] action in this matter including, but not limited to, requesting injunctive relief and a declaration that [the commission] has exceeded its statutory and regulatory authority.” Based on your arguments and our review of the submitted information, we agree that the commission reasonably anticipated litigation on the date the commission received the present request, and we find that the information at issue relates to the anticipated litigation. Thus, the commission may withhold most of the submitted information in Exhibit D pursuant to section 552.103 of the Government Code.

We note, however, that the purpose of section 552.103 is to enable a governmental body to protect its litigation interests by forcing parties to obtain information that relates to litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). Thus, if all opposing parties to the anticipated litigation have seen or had access to, through discovery or otherwise, any of the information at issue, 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, it appears that the opposing party has already seen or had access to one of the submitted e-mails. Accordingly, while most of the information at issue 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. We further note that the applicability of section 552.103 to this information ends at the conclusion of the related litigation. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We note that the information that has been previously seen by the opposing party contains e-mail addresses that may be subject to section 552.137 of the Government Code. Section 552.137 provides as follows:

- (a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.
- (c) Subsection (a) does not apply to an e-mail address:
 - (1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor’s agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Section 552.137(a) is applicable to certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with a governmental body, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. Section 552.137(a) is not applicable to the types of e-mail addresses listed in section 552.137(c) or to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. To the extent that the e-mail addresses that we have marked are not encompassed by section 552.137(c), they must be withheld from disclosure under section 552.137 unless the individual to whom a particular e-mail address belongs has affirmatively consented to its public disclosure.

In summary, the department may withhold the submitted information not previously seen by the opposing party pursuant to section 552.103 of the Government Code. To the extent that the e-mail addresses that we have marked are not encompassed by section 552.137(c), they must be withheld from disclosure under section 552.137 unless the individual to whom a particular e-mail address belongs has affirmatively consented to its public disclosure.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/seg

Ref: ID# 225170

Enc. Submitted documents

c: Mr. David Mann
The Texas Observer
307 West 7th Street
Austin, Texas 78701
(w/o enclosures)