



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 15, 2008

Mr. Jeffrey R. Hill
Associate General Counsel
Texas Department of Licensing and Regulation
P. O. Box 12157
Austin, Texas 78711

OR2008-00714

Dear Mr. Hill:

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# 299453.

The Texas Department of Licensing and Regulation (the "department") received a request for nine categories of information regarding a named department investigator.¹ You state you have provided the requestor with a portion of the requested information. You claim that the remaining information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note that a portion of the submitted information was created after the request for information was received, and is thus not responsive to the present request. This ruling does not address the public availability of any information that is not responsive to the request, and the department is not required to release this information, which we have marked, in response to this request. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed).

Next, we note that section 552.022 of the Government Code governs a portion of the submitted information. Section 552.022 provides:

¹ We note that the requestor clarified his original request. See Gov't Code § 552.222(b)(governmental body may ask requestor to clarify request).

(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). Part of the submitted information, which we have marked, consists of completed reports made by the department that are expressly public under section 552.022(a)(1) unless excepted under section 552.108 of the Government Code or confidential under other law. The department asserts that this information is excepted from disclosure under section 552.103 of the Government Code. However, section 552.103 is a discretionary exception and, as such, is not other law for purposes of section 552.022. *See 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 section 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Accordingly, section 552.103 is not applicable to the completed reports we have marked, and they may not be withheld on this basis.

We note, however, that the information subject to section 552.022 contains a credit card number and a bank account number subject to section 552.136 of the Government Code, and a personal e-mail address subject to section 552.137 of the Government Code.² Section 552.136 states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov't Code § 552.136(b). The department must withhold the credit card number and the bank account number that we have marked under section 552.136 of the Government Code.

Section 552.137 requires a governmental body to withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See* Gov't Code § 552.137(b). You do not inform us that the owner of the e-mail address has affirmatively consented to its release. Therefore, the department must withhold the e-mail address we have marked under section 552.137. The remaining information subject to section 552.022(a)(1) must be released.

² The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Finally, we address your claim under section 552.103 for the remaining information not subject to section 552.022(a)(1). Section 552.103 provides:

(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 department 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 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). The department must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated for purposes of section 552.103, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *See* Open Records Decision No. 452 at 4 (1986). In the context of anticipated litigation in which the governmental body is the prospective prosecutor or plaintiff, 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) (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). But this office considers a contested case under the Texas Administrative Procedure Act (the "APA"), Government Code chapter 2001, to constitute "litigation" for purposes of section 552.103. *See* Open Records Decision Nos. 588 (1991), 301 (1982).

You inform us that the remaining information not subject to section 552.022(a)(1), which consists of investigator notes and supporting evidence, pertains to pending investigations conducted by the individual at issue. You also state that “[o]nce investigation is completed, the [d]epartment will consider setting each case for an administrative hearing as a contested case before the State Office of Administrative Hearings.” Based on these representations, we conclude that the department anticipated litigation when it received the request for information. We also find that the investigator notes and supporting evidence are related to the anticipated litigation. Accordingly, the department may withhold this information under section 552.103.

However, once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, any submitted information that has either been obtained from or provided to all other parties in the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the department must withhold the information we have marked under sections 552.136 and 552.137 of the Government Code. The department may withhold the information not subject to section 552.022(a)(1) under section 552.103 of the Government Code. The remaining information 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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

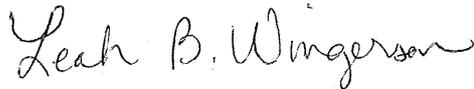
Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor 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 challenge 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 Office of the Attorney General 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,



Leah B. Wingerson
Assistant Attorney General
Open Records Division

LBW/ma

Ref: ID# 299453

Enc. Submitted documents

c: Mr. K. Link Fuller
Canyon Lake Auction Co.
17290 F.M. 306
Canyon Lake, Texas 78133
(w/o enclosures)