



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 19, 2008

Mr. Brad Bowman  
Assistant General Counsel  
Texas Department of Licensing and Regulation  
P.O. Box 12157  
Austin, Texas 78711

OR2008-15901

Dear Mr. Bowman:

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# 328240.

The Texas Department of Licensing and Regulation (the "department") received a request for all information pertaining to the requestor and all information related to complaints involving two named individuals. You claim that the submitted 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 reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses section 301.081 of the Labor Code. Section 301.081 governs the release of employment information held by the Texas Workforce Commission (the "commission"). Section 301.081 provides in pertinent part as follows:

- (a) Each employing unit shall keep employment records containing information as prescribed by the commission and as necessary for the proper administration of this title. The records are open to inspection and may be

copied by the commission or an authorized representative of the commission at any reasonable time and as often as necessary.

...

(c) Employment information obtained or otherwise secured under this section may not be published and is not open to public inspection, other than to a public employee in the performance of public duties, except as the commission considers necessary for the proper administration of this title or as provided by commission rule and consistent with federal law.

Labor Code § 301.081(a), (c). Most of the documents in Exhibit 4 are employment records maintained by the commission. Section 301.081(c) states that employment information maintained by the commission may be released to a public employee in the performance of public duties. *Id.* § 301.081(c). You state, and provide documentation showing, that the employment records in Exhibit 4 were provided to an employee of the department for the purpose of investigating a complaint against the named individuals. Based on your representations and our review of Exhibit 4, we agree that the employment information is confidential under section 301.081 of the Labor Code and must be withheld by the department under section 552.101. However, Exhibit 4 also includes communications between the department and the commission regarding the receipt of these records. These communications are not employment information. Therefore, these communications, which we have marked, are not confidential pursuant to section 301.081. As you have not provided any further arguments against their disclosure, these communications must be released.<sup>1</sup>

You claim section 552.103 of the Government Code for the information in Exhibit 2 and the marked information in Exhibit 3. Section 552.103 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 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

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<sup>1</sup>We note that the communications contain social security numbers. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

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 purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). 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 that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Thomas v. Corryn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *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.); ORD 551 at 4. A governmental body 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).

You state that the department's Enforcement Division is prosecuting several cases against one of the named individuals and that a contested hearing before the State Office of Administrative Hearings was scheduled to take place at the time the department received the present request. A contested case before the State Office of Administrative Hearings is considered litigation for the purposes of section 552.103. *See* Open Records Decision Nos. 588 (1991) (concluding contested cases under Administrative Procedures Act are litigation for purposes of section 552.103), 301 (1982). Based on your representations and our review, we conclude that the department anticipated litigation on the date it received the instant request. You inform us that Exhibit 2 consists of e-mails between the Enforcement Division attorney who is handling the cases and the individuals who will be called as witnesses at the hearing. You also inform us that the information you have marked in Exhibit 3 are handwritten notes made by Enforcement Division attorneys and a legal assistant. Based on your representations and our review of Exhibits 2 and 3, we agree that

this information is related to the anticipated litigation. Accordingly, the department may withhold Exhibit 2 and the information you have marked in Exhibit 3 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, information that has either been obtained from or provided to all parties to 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, except as we have marked for release, the department must withhold Exhibit 4 under section 552.101 in conjunction with section 301.081 of the Labor Code. The department may withhold the e-mails in Exhibit 2 and the marked information in Exhibit 3 under section 552.103. 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). If the governmental body does not file suit over 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,



Olivia A. Maceo  
Assistant Attorney General  
Open Records Division

OM/eeg

Ref: ID# 328240

Enc. Submitted documents

c: Requestor  
(w/o enclosures)