



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 2, 2008

Mr. Thomas D. McClure
Assistant General Counsel
Texas Department of State Health Services
P.O. Box 149347
Austin, Texas 78714-9347

OR2008-16381

Dear Mr. McClure:

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# 329023.

The Texas Department of State Health Services (the "department") received a request for information related to the termination of the requestor's client.¹ You claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.²

Section 552.103 of the Government Code provides, in pertinent part, the following:

- (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

¹ The requestor clarified the request to exclude any attorney-client communications. *See Gov't Code § 552.222* (requestor may clarify request).

² We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See Open Records Decision Nos. 499 (1988), 497 (1988)*. This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

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). 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).

You state that the requestor's client was terminated on August 27, 2008, and the requestor's client filed a request for a due process administrative hearing. You contend that the department's administrative hearing constitutes "litigation," and the submitted information is related to the pending litigation for purposes of section 552.103. This office has held that "litigation" within the meaning of section 552.103 includes contested cases conducted in a quasi-judicial forum. *See, e.g.*, Open Records Decision Nos. 474 (1987), 368 (1983), 301 (1982). For instance, this office has held that cases conducted under the Texas Administrative Procedure Act, chapter 2001 of the Government Code, constitute "litigation" for purposes of section 552.103. *See, e.g.*, Open Records Decision Nos. 588 (1991) (proceeding of former State Board of Insurance), 301 (proceeding of Public Utilities Commission). In determining whether an administrative proceeding is conducted in a quasi-judicial forum, this office has considered the following factors: 1) whether the dispute is, for all practical purposes, litigated in an administrative proceeding where a) discovery takes place, b) evidence is heard, c) factual questions are resolved, d) a record is made; and 2) whether the proceeding is an adjudicative forum of first jurisdiction, i.e., whether judicial review of the proceeding in district court is an appellate review and not the forum for resolving a controversy on the basis of evidence. *See* ORD 588.

You assert that the department's human resources policies (the "policies") and the procedures delineated within constitute administrative hearings that are sufficiently adjudicative to be considered litigation for purposes of section 552.103. In this instance, you provide a copy of the department's policies, which provide that in certain circumstances an

employee may file a grievance upon termination. An employee who files a proper grievance shall have an administrative hearing before the Texas Health and Human Services Commission's Appeals Division. The rules specify that the parties in a grievance hearing have reasonable opportunity to prepare for the hearing, and present evidence and testimony. You state that the policies require that the department should show good reason existed for the dismissal and do so by a preponderance of the evidence. Finally, you state that the Appeals Division is required to issue a decision following the close of the hearing and that decision is final and binding on the parties. Having reviewed your arguments and information at issue, we find that the department's grievance process is conducted in a quasi-judicial forum, and agree that the litigation was pending on the date the department received the request. Further, we also find that this information is related to the pending litigation for purposes of section 552.103. Thus, the submitted information may generally be withheld under section 552.103.

We note, however, that the opposing party in the litigation has seen or had access to some of the submitted information. 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* ORD 551 at 4-5. Thus, if the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, to the extent that the opposing party in the litigation has seen or had access to the submitted information, any such information is not protected by section 552.103 and may not be withheld on that basis. Furthermore, the applicability of section 552.103(a) ends when the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.³ Thus, the department may withhold the information the opposing party has not seen or had access to 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

³ We note some of the information being released is confidential and not subject to release to the general public. However, the requestor in this instance has a special right of access to the information. Gov't Code § 552.023. Should the department receive another request for these same records from a person who would not have a special right of access to the private information, the department should resubmit this same information and request another ruling from this office. *See id.* §§ 552.301(a), .302.

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,



Chris Schulz
Assistant Attorney General
Open Records Division

CS/ma

Ref: ID# 329023

Enc. Submitted documents

cc: Requestor
(w/o enclosures)