



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

January 26, 2009

Ms. Cynthia Villarreal-Reyna
Section Chief, Agency Counsel
Legal & Compliance Division
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2009-01001

Dear Ms. Villarreal-Reyna:

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# 333243 (TDI # 84083).

The Texas Department of Insurance (the "department") received a request for information related to a named individual's license. You indicate the department is withholding information pursuant to the previous determination set forth in Open Records Letter No. 2005-05223 (2005) (previous determination for department under section 552.101 of Government Code in conjunction with section 701.151 of Insurance Code). You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.111, 552.136, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note the submitted information includes court-filed documents that are subject to section 552.022(a)(17) of the Government Code. Section 552.022(a)(17) provides for required public disclosure of "information that is also contained in a public court record," unless the information is expressly confidential under other law. Gov't Code § 552.022(a)(17). We have marked the court-filed documents that are subject to section 552.022(a)(17). You seek to withhold the court-filed documents under sections 552.101, 552.103, and 552.136 of the Government Code. However, section 552.103 is a discretionary exception to disclosure that protects a governmental body's interests and

may be waived. *See id.* § 552.007; *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); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 473 (1987) (governmental body may waive section 552.103). As such, section 552.103 is not other law that makes information expressly confidential for the purposes of section 552.022(a)(17). Therefore, the department may not withhold the marked court-filed documents under section 552.103. However, sections 552.101 and 552.136 are considered “other laws” for purposes of section 552.022(a)(17), and we will consider the department’s arguments under these exceptions for the information subject to section 552.022.

You contend information contained in the court documents is protected by privacy under section 552.101 of the Government Code. 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. This section encompasses the doctrine of common-law privacy, which protects information that (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be satisfied. *Id.* at 681-82. We note, however, that information otherwise confidential under common-law privacy may not be withheld in a court-filed document. *See Star-Telegram v. Walker*, 834 S.W.2d 54 (Tex. 1992) (sexual assault victim’s privacy right not violated by release of information in public court document). Therefore, the department may not withhold any portion of the marked court-filed documents under section 552.101 in conjunction with common-law privacy.

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. An access device number is one that may be used to (1) obtain money, goods, services, or another thing of value; or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument. *Id.* Although you assert the consumer file numbers you have marked are access device numbers, we find that you have failed to demonstrate how the file numbers at issue constitute access device numbers used to obtain money, goods, services, or another thing of value or initiate a transfer of funds other than a transfer originated solely by paper instrument. We therefore conclude the department may not withhold the marked consumer file numbers, and must only withhold the information we have marked under section 552.136 of the Government Code.

We now address your argument under section 552.103 for the remaining submitted information not subject to section 522.022. Section 552.103 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 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 department 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).

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). When the governmental body is the prospective plaintiff in litigation, 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 section 552.103 and that litigation is "reasonably likely to result"). For the purposes of section 552.103(a), this office considers a contested case under the Texas Administrative Procedure Act ("APA"), Government Code chapter 2001, to constitute "litigation." Open Records Decision No. 588 at 7 (1991) (construing statutory predecessor to the APA).

You state the department anticipates initiating litigation under section 4005.101 of the Insurance Code. See Ins. Code § 4005.101(b)(1). You have provided an affidavit from a staff attorney in the department's Enforcement Division stating the department is currently investigating the complaint at issue for potential violations of the Texas Insurance Code. This affidavit also states that, once the investigation is complete, the department may need to take administrative action against the license holder. Based on your representations, we conclude the department reasonably anticipates litigation. Further, we find the investigation

antedated the request for information and the information relates to the anticipated litigation. Therefore, except for the documents we marked for release, the department may withhold the remaining information under section 552.103 of the Government Code.¹

As to the documents we marked for release, we note once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Because the opposing party has seen the marked documents, section 552.103 does not except these documents from disclosure.²

The department asserts portions of the documents we marked for release are excepted under section 552.137. Section 552.137 of the Government Code excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a) - (c). We note that subsection (c) specifically excludes an e-mail address "provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public." *Id.* § 552.137(c)(4). We note that you have marked an e-mail address contained on a letterhead. Therefore, the department may not withhold this e-mail address under section 552.137 of the Government Code. The department must only withhold the e-mail addresses we marked under section 552.137, unless the owners of the addresses consented to their release.

In summary, the department may withhold under section 552.103 all but the information subject to section 552.022(a)(17) and the information seen by the opposing party that we marked for release. The department must withhold the information we have marked under section 552.136 and the e-mail addresses we have marked under section 552.137, unless the owners consented to their release. The remaining information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

¹As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

²Further, the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Emily Sitton
Assistant Attorney General
Open Records Division

EBS/eeg

Ref: ID# 333243

Enc. Submitted documents

c: Requestor
(w/o enclosures)