



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 17, 2009

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

OR2009-17893

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# 364521 (TDLR # 5865).

The Texas Department of Licensing and Regulation (the "department") received a request for information relating to two named individuals and a named business entity. You state that some of the requested information either has been or will be released. You claim that the submitted information is excepted from disclosure under sections 552.103, 552.137, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the information you submitted.

Section 552.103 of the Government Code 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). A governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

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 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) (finding that 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").* The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See ORD 452 at 4.* We note that this office considers a contested case under the Texas Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code, to constitute "litigation" for the purposes of section 552.103. *See Open Records Decision Nos. 588 (1991), 301 (1982).*

You state that the submitted information pertains to a pending investigation of alleged violations of chapter 1302 of the Occupations Code and chapter 75 of title 16 of the Texas Administrative Code that "may result in the imposition of administrative penalties and/or license sanctions[.]" You inform us that the investigation is the result of a complaint that was received prior to the department's receipt of this request for information. You also inform us that the department "h[as] reason to believe that this matter will be set for administrative hearing as a contested case before the State Office of Administrative Hearings." You state that the department anticipates that the submitted information will be offered as evidence in an administrative hearing. Based on your representations and our review of the information at issue, we find that the submitted information is related to litigation that the department reasonably anticipated on the date of its receipt of this request

for information. We therefore conclude that section 552.103 of the Government Code is generally applicable to the submitted information.<sup>1</sup>

In this instance, however, the opposing party in the anticipated litigation appears to have previously seen or had access to some of the submitted information. We note that 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. If the opposing party previously 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 anticipated litigation has previously seen or had access to the submitted information, any such information may not be withheld under section 552.103. The department may withhold the rest of the submitted information under section 552.103. We note that the applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We note that section 552.136 of the Government Code is applicable to some of the information that the opposing party in the anticipated litigation appears to have previously seen.<sup>2</sup> Section 552.136(b) states that “[n]otwithstanding any other provision of [the Act], 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); *see id.* § 552.136(a) (defining “access device”). The department must withhold the bank account numbers we have marked under section 552.136 to the extent that the documents in which the account numbers appear may not be withheld under section 552.103.

In summary: (1) except for information that the opposing party in the litigation has previously seen or to which the opposing party has previously had access, the department may withhold the submitted information under section 552.103 of the Government Code; and (2) the marked bank account numbers must be withheld under section 552.136 of the Government Code to the extent that the documents in which the account numbers appear may not be withheld under section 552.103.

---

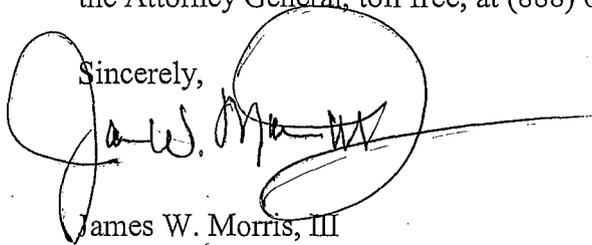
<sup>1</sup>As we are able to make this determination, we need not address your claims under sections 552.137 and 552.147 of the Government Code.

<sup>2</sup>Unlike other exceptions to disclosure under the Act, this office will raise section 552.136 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov’t Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

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.

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](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, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "James W. Morris, III", is written over a circular stamp. The signature is fluid and cursive, with a long horizontal line extending to the right.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/cc

Ref: ID# 364521

Enc: Submitted documents

c: Requestor  
(w/o enclosures)