



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 4, 2010

Mr. Reg Hargrove
Assistant Attorney General
Public Information Coordinator
General Counsel Division
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR2010-06392

Dear Mr. Hargrove:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 378178 (PIR No. 10-27246).

The Office of the Attorney General (the "OAG") received a request for communications concerning Petland, Inc. or its franchise stores in Texas. The requestor excludes privileged attorney-client communications and work product from his request. The OAG released some information and argues the remainder is excepted from disclosure under section 552.103 of the Government Code. We have considered the OAG's claimed exception and have reviewed the submitted sample of information.¹ We have also received and considered the requestor's comments. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

First, the requestor contends the OAG waived its assertion under section 552.103 of the Government Code because the OAG failed to comply with section 552.301(e-1) of the Government Code by not sending the requestor a copy of Exhibit C. The OAG attached

¹We 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.

Exhibit C as further support of its section 552.103 assertion that it anticipates filing claims under the Texas Deceptive Trade Practices Act (“DTPA”) against Petland and its franchise stores. Section 552.301(e-1) states a “governmental body that submits written comments to the attorney general . . . shall send a copy of those comments to the person who requested the information from the governmental body not later than the 15th business day after the date of receiving the written request.” *Id.* § 552.301(e-1). We find the requestor’s receipt of the OAG’s May 10, 2010 brief which provides the substance of the OAG’s arguments under section 552.103 satisfies the statutory requirement under section 552.301(e-1). Thus, the OAG did not waive its assertion under section 552.103.

Section 552.103, the litigation exception, 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 on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Id. § 552.103(a), (c). The OAG has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in this particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date that the request for information is received, 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 OAG 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 Gov’t Code § 552.103 and that litigation is “reasonably likely to result”).

In this instance, the OAG states its Consumer Protection Division is currently investigating the entities named in the request for potential violations of the DTPA. The OAG states this investigation antedated the request for information, may result in litigation, and was undertaken for that purpose. Lastly, the OAG explains the information relates to this anticipated lawsuit. After reviewing the OAG's arguments and the submitted records, we conclude the requested information relates to the OAG's anticipated litigation. Thus, the OAG has demonstrated the applicability of section 552.103 to the remaining requested information.

The requestor argues the OAG waived its section 552.103 claim by releasing hundreds of documents responsive to requested item one for complaints the OAG received either directly or as a result of being forwarded to the OAG by the Better Business Bureau. The requestor opines such complaints are comparable to communications to or from the Humane Society of the United States or the People for the Ethical Treatment of Animals that the requestor asked for in item three, and the "OAG cannot pick and choose among documents standing in exactly the same legal status." The requestor cites no legal authority to support his contention. Section 552.007 of the Government Code provides:

- (a) This chapter does not prohibit a governmental body or its officer for public information from voluntarily making part or all of its information available to the public, unless the disclosure is expressly prohibited by law or the information is confidential under law.
- (b) Public information made available under Subsection (a) must be made available to any person.

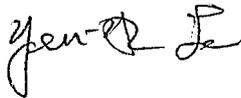
Gov't Code § 552.007. Thus, section 552.007 prohibits an agency from selectively disclosing information that is not confidential by law but that an agency may withhold under an exception to disclosure. Therefore, if an agency releases nonconfidential information to a member of the public, then the agency must release the exact same information to all members of the public who request it. However, section 552.007 does not prohibit an agency from withholding similar types of information or "documents standing in exactly the same legal status" once similar, but not the exact information, has been released. Thus, the requestor's argument is not supported by the law. Accordingly, the OAG may withhold the information under section 552.103.

Generally, however, 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 it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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, 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,



Yen-Ha Le
Assistant Attorney General
Open Records Division

YHL/sdk

Ref: ID# 378178

Enc: Submitted documents

c: Requestor
(w/o enclosures)