



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 19, 2010

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

OR2010-15829

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# 397755 (TDLR ID# 6513).

The Texas Department of Licensing and Regulation (the "department") received a request for e-mail and cellular telephone records of a named department employee during a specified time period and six categories of information pertaining to complaint no. ELC2010007676S. You state the department is releasing some of the responsive information to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

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

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.

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).*

We understand you to make two separate arguments under section 552.103 for separate information. You inform us that the information pertaining to complaint number ELC2010007676S relates to an investigation and successful sting operation by the department's enforcement division. You state that the department is currently initiating contested case proceedings as a result of the sting operation. You state the information pertaining to complaint number ELC2010007676S has been compiled for the anticipated contested case hearings. We note that a contested case before the State Office of

Administrative Hearings is considered litigation for the purposes of section 552.103. *See id.* Based on your representations and our review of the information at issue, we find the information pertaining to complaint number ELC2010007676S, which we have marked, is related to litigation that the department reasonably anticipated on the date of its receipt of this request for information. We, therefore, conclude that the department may withhold the information pertaining to complaint number ELC2010007676S under section 552.103 of the Government Code.²

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. *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 been concluded or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

You also claim that the remaining information, which consists of e-mails of a department investigator pertaining to other investigations, are excepted under section 552.103. You state that the investigator at issue is responsible for numerous open and ongoing investigations and that hundreds of e-mails responsive to the request involve such open investigations. You state that these investigations may effect the pecuniary interests of the persons under investigation and argue that under the totality of the circumstances the department anticipates litigation with regards to the e-mails pertaining to the ongoing investigations. However, you do not provide us with any information pertaining to the specific violations at issue in the investigations, nor do you explain why such investigations would result in litigation. Upon review of your arguments, we find that the department has failed to meet its burden to prove that it reasonably anticipates litigation with regard to the remaining information. Accordingly, the department may not withhold the remaining information under section 552.103 of the Government Code.

We note that the remaining information contains information that may be subject to section 552.117 of the Government Code.³ Section 552.117(a)(1) excepts from disclosure the current and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open

²As our ruling is dispositive of this information, we need not address the remaining arguments against disclosure.

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Records Decision No. 530 at 5 (1989). The department may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. We note section 552.117 is also applicable to personal cellular telephone numbers, provided the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988) (section 552.117 not applicable to cellular telephone numbers paid for by governmental body and intended for official use). You have not informed us whether or not the employee whose cellular telephone number we have marked in the remaining information chose to withhold this information prior to the department's receipt of the request for information. Therefore, if the employee timely elected to withhold his cellular telephone number, the department must withhold the information we have marked under section 552.117(a)(1) of the Government Code; however, if the marked cellular telephone number was paid for by the department, it may not be withheld under section 552.117(a)(1). If the employee did not timely elect to withhold the marked information, then the department may not withhold it under section 552.117(a)(1) of the Government Code.

The remaining information contains e-mail addresses. 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). *See* Gov't Code § 552.137(a)-(c). The types of e-mail addresses listed in section 552.137(c) may not be withheld under this exception. *See id.* § 552.137(c). The e-mail addresses we have marked in the remaining information are not of the types specifically excluded by section 552.137(c). Accordingly, the e-mail addresses we have marked must be withheld under section 552.137 of the Government Code, unless the owners affirmatively consent to their disclosure.⁴

In summary, the department may withhold the information we have marked under section 552.103 of the Government Code. If the employee timely elected to withhold his cellular telephone number, the department must withhold the information we have marked under section 552.117(a)(1) of the Government Code; however, if the marked cellular telephone number was paid for by the department, it may not be withheld under section 552.117(a)(1) of the Government Code. The e-mail addresses we have marked must be withheld under section 552.137 of the Government Code, unless the owners affirmatively consent to their disclosure. As no further exceptions to its disclosure are raised, the remaining information must be released.

⁴We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including the e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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,



Laura Ream Lemus
Assistant Attorney General
Open Records Division

LRL/eb

Ref: ID# 397755

Enc. Submitted documents

c: Requestor
(w/o enclosures)