



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 14, 2010

Mr. James G. Nolan  
Open Records Attorney  
Texas Comptroller of Public Accounts  
P.O. Box 13528  
Austin, Texas 78711-3528

OR2010-18685

Dear Mr. Nolan:

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# 402877-(CPA ID# 6657803589).

The Texas Comptroller of Public Accounts (the "comptroller") received a request for a list of individuals who were unable to register for certificates or for the waiting list under the Texas Trade Up Appliance Rebate Program (the "rebate program"). You claim the requested information is excepted from disclosure under sections 552.101, 552.103, 552.137, and 552.139 of the Government Code. You also state you have notified the United States Department of Energy. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Section 552.103 provides in relevant part as follows:

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<sup>1</sup>We assume 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 those records contain substantially different types of information than those submitted to this office.

(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 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 is pending or reasonably anticipated on the date the comptroller 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 governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish litigation is reasonably anticipated for the 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). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.<sup>2</sup> *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the

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<sup>2</sup>In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

concrete evidence must at least reflect litigation is “realistically contemplated.” *See* ORD 518 at 5; *see also* Attorney General Opinion MW-575 (1982) (finding investigatory file may be withheld if governmental body attorney determines it should be withheld pursuant to section 552.103 and litigation is “reasonably likely to result”). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* ORD 452 at 4.

You assert all of the requested information is subject to section 552.103. You state the comptroller anticipated litigation on the date the request for information was received. You state Helgeson Enterprises, Inc. (“Helgeson”) was contracted by the comptroller to administer the rebate program and that the comptroller was not satisfied with Helgeson’s performance under the contract. You have submitted documents showing the comptroller is requiring Helgeson to provide it with certain information about the rebate program so the comptroller “may determine whether Helgeson is meeting the requirements of the [c]ontract.” You argue “an agency can be trying to avoid litigation while still having a reasonable anticipation of litigation.” You indicate, and the submitted documents reflect, the comptroller anticipated litigation against Helgeson pertaining to its contractual performance. You explain the requested information is related to the anticipated litigation because it pertains directly to the quality of services provided by Helgeson in relation to the rebate program. Based on your representations and our review, we find the comptroller reasonably anticipated litigation on the date the comptroller received the request for information. Further, we agree the information at issue relates to the anticipated litigation. Accordingly, we find the comptroller may withhold the information at issue under section 552.103.<sup>3</sup>

We note, and you acknowledge, that once the requested information has been obtained by the potential opposing party to the anticipated litigation, through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). You state none of the information at issue has been obtained by Helgeson. We also note 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 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.

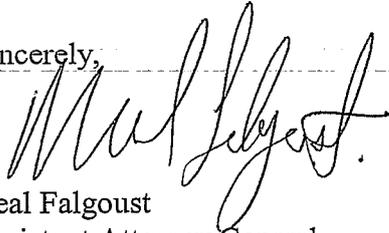
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), 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

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<sup>3</sup>As our ruling is dispositive, we do not address your remaining arguments against disclosure.

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,



Neal Falgoust  
Assistant Attorney General  
Open Records Division

NF/dls

Ref: ID# 402877

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Mr. Roland Risser  
Program Manager  
Office of Building Technologies Program  
Department of Energy  
Washington, D.C. 20585  
(Third Party, w/o enclosures)