



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 1, 2011

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

OR2011-02316

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# 409148 (TDI #110551).

The Texas Department of Insurance (the "department") received a request for all documents since June 1, 2010 through the date of the request that relate to the Letters of Clarification approval and denial process, including memoranda, directions to department employees, checklists, documents, emails, letters, advisories, and training materials. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code.¹ We have considered the claimed exceptions and reviewed the submitted representative sample of information.²

¹Although you initially raised section 552.116 in your letter of December 9, 2010, you inform us that you no longer assert that exception.

²We 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.

Initially, you state that most of the responsive information was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2011-00282 (2011). In that ruling, we determined that some of the requested information was subject to section 552.022(a)(15) and must be released, and that the department may withhold the remaining information at issue under section 552.103. As we have no indication that the law, facts, and circumstances on which the prior ruling was based have changed, the department may continue to rely on Open Records Letter No. 2011-00282 as a previous determination and withhold or release that information in accordance with the prior ruling. See Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). You state that the submitted information was not subject to our previous ruling. Accordingly, we will address your arguments against disclosure of this information.

We next note that a portion of the submitted information, which we have marked, was created after the date the department received the request. The Act does not require a governmental body to release information that did not exist when it received a request, or to create responsive information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dism'd); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983). Thus, the marked information is not responsive to the request. This decision does not address the public availability of non-responsive information, and the department need not release it in response to this request.

We now address your arguments against disclosure of the remaining information. Section 552.103 of the Government Code provides, in relevant 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 subdepartment is or may be a party or to which an officer or employee of the state or a political subdepartment, 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 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* Open Records Decision No. 551 at 4-5 (1990). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception applies in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the requested information is related to that litigation. *See 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.); ORD 551 at 4. The governmental body must meet both parts of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

You state that prior to the department's receipt of the instant request, a lawsuit styled *Indemnity Insurance Co. of North America vs. Candida Jove, and Old Republic Insurance Co., and Texas Department of Insurance (Division of Workers' Compensation)*, Cause No. 10-10523, was filed in the 191st Judicial District Court of Dallas County, Texas. You further state that this litigation is still pending. We therefore agree that litigation was pending at the time of the request. You state that the pending litigation involves, among other things, errors alleged by the plaintiff to have been committed by the department regarding letters of clarification, the subject of the instant request. Based on your representations and our review of the submitted information, we find the department has established the information at issue relates to the pending litigation for purposes of section 552.103. Therefore, the department may withhold the responsive information under section 552.103 of the Government Code. As our ruling is dispositive, we need not address your remaining arguments against disclosure.

We note once the information at issue has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists as to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all other parties in the litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. The applicability of section 552.103(a) also 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,

A handwritten signature in cursive script that reads "Misty Haberer Barham".

Misty Haberer Barham
Assistant Attorney General
Open Records Department

MHB/eeg

Ref: ID # 409148

Enc. Submitted documents

c: Requestor
(w/o enclosures)