



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 18, 2012

Mr. Christopher Sterner  
Assistant General Counsel  
Office of the Governor  
P.O. Box 12428  
Austin, Texas 78711

OR2012-07505

Dear Mr. Sterner:

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# 454215 (OOG ID# 073-12).

The Office of the Governor (the "governor's office") received a request for any correspondence sent from the governor's office regarding the Women's Health Program ("WHP"), family planning or Planned Parenthood in the last year, any correspondence received by the governor's office regarding the WHP, family planning, or Planned Parenthood in the last three months, and any correspondence to or from anyone from the Texas Health and Human Services Commission (the "HHSC") regarding the WHP, family planning, or Planned Parenthood in the last year. You state you have released some of the requested information. You also state the governor's office has redacted personal information of employees subject to section 552.117 pursuant to section 552.024 of the Government Code and personal e-mail addresses under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).<sup>1</sup> You claim portions of the

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<sup>1</sup>Section 552.024(c)(2) of the Government Code authorizes a governmental body to redact information protected by section 552.117(a)(1) of the Government Code without the necessity of requesting a decision under the Act if the current or former employee or official to whom the information pertains timely chooses not to allow public access to the information. See Gov't Code § 552.024(c)(2). Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including personal e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

remaining responsive information are excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. Additionally, you state the requested information may implicate the interests of third parties. Accordingly, you inform us you notified the Office of the Attorney General (the “OAG”) and the Texas Department of State Health Services (“DSHS”) of the request and of their right to submit comments to this office as to why the requested information should not be released to the requestor. *See* Gov’t Code § 552.304 (providing that any person may submit comments stating why information should or should not be released). We have received comments from the OAG and DSHS. We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>2</sup>

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.

*Id.* § 552.103(a), (c). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To meet this burden, the governmental body must demonstrate (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, orig. proceeding); *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).

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<sup>2</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 that submitted to this office.

To establish litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” 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) (finding 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”). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. See ORD 452 at 4.

You and the OAG claim the submitted information is excepted from disclosure under section 552.103 because litigation relating to the subject of the present request was reasonably anticipated at the time the governor’s office received the request. You state prior to the date of the present request, the HHSC requested a continuation of a Medicaid eligibility waiver from the federal Centers for Medicare and Medicaid Services (the “CMS”) on behalf of the State of Texas to receive federal funds for the WHP. You state the CMS issued a letter to the HHSC denying the waiver request on December 12, 2011. You inform us the governor’s office realistically contemplated and began preparing for litigation challenging the CMS decision upon receipt of the letter. Based on the submitted arguments and our review of the information at issue, we find litigation was reasonably anticipated on the date the governor’s office received the instant request. Further, you, and the OAG, explain the information at issue is related to the anticipated litigation because it pertains to the funding, operation, and impact of the WHP, and the family planning policies of the governor’s office and the State of Texas. Therefore, we find the submitted information is related to the anticipated litigation for purposes of section 552.103 of the Government Code. Accordingly, the governor’s office may withhold the submitted information under section 552.103 of the Government Code. As our ruling is dispositive, we need not address your remaining arguments, nor those of DSHS.

In reaching this conclusion, we assume that the opposing party in the pending litigation has not seen or had access to any of the information at issue. 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 has seen or had access to information relating to pending 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). We note the applicability of section 552.103 ends once the related litigation concludes. See 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 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,



Charles Galindo Jr.  
Assistant Attorney General  
Open Records Division

CG/em

Ref: ID# 454215

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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