



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 30, 2012

Ms. Susan D. Banowsky  
Bickham & Banowsky, LLP  
111 Congress Avenue, Suite 400  
Austin, Texas 78701

OR2012-11819

Dear Ms. Banowsky:

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# 460500.

The Texas Windstorm Insurance Association (the "association"), which you represent, received a request for e-mails to or from three named individuals during a specified time period. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, we note a portion of the submitted information, which we have marked, is not responsive to the instant request because it is not within the specified time period. This ruling does not address the public availability of non-responsive information, and the association is not required to release non-responsive information in response to this request.

Next, we note portions of the requested information may be subject to a previous determination issued by this office in Open Records Letter No. 2010-01775 (2010). In Open Records Letter No. 2010-01775, we ruled the association (1) must withhold the information we marked under section 552.101 of the Government Code in conjunction with the

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<sup>1</sup>We 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.

Gramm-Leach-Bliley Act; (2) may withhold certain e-mails under section 552.107 of the Government Code; (3) may withhold the information we marked under section 552.111 of the Government Code; (4) must withhold the e-mail address we marked under section 552.137 of the Government Code; and (5) must release the remaining information. You now raise sections 552.103 and 552.107 of the Government Code for the requested information. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); see also Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law).* Accordingly, pursuant to section 552.007, the association may not now withhold any previously released information unless its release is expressly prohibited by law or the information is confidential under law. Although you raise sections 552.103 and 552.107, these sections do not prohibit the release of information or make information confidential. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision Nos. 676 at 10-11 (attorney-client privilege under section 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Thus, to the extent any portion of the requested information was released in accordance with Open Records Letter No. 2010-01775, the association may not now withhold such information under section 552.103 or section 552.107. Accordingly, as we have no indication the law, facts, and circumstances on which Open Records Letter No. 2010-01775 was based have changed, the association must continue to rely on Open Records Letter No. 2010-01775 as a previous determination and withhold or release the identical information in accordance with this ruling. *See Open Records Decision No. 673 (2001) (so long as law, facts, 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).* To the extent the requested information was not subject to Open Records Letter No. 2010-01775, we will address your arguments under sections 552.103 and 552.107.

Section 552.103 of the Government Code provides, in 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.

Gov't Code § 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 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).*

You state a lawsuit styled *Boyle v. Texas Windstorm Insurance Association*, Cause No. 11CV1515, was pending in the District Court of Galveston County, Texas, 40<sup>th</sup> Judicial District on the date the association received the present request for information. You state the information at issue relates to this lawsuit. Based on your representations and our review of the information at issue, we find the remaining responsive information relates to litigation involving the association that was pending prior to the date the association received the request for information. Thus, the association may withhold the remaining responsive information under section 552.103 of the Government Code.<sup>2</sup>

We note, however, once the information at issue has been obtained by all parties to the pending 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).* Thus, any information obtained from or provided to all other parties in the pending 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 concluded or is no longer reasonably anticipated. *See Attorney General Opinion MW-575 (1982); see also Open Records Decision No. 350 (1982).*

In summary, to the extent the requested information was ruled upon in Open Records Letter No. 2010-01775, the association must rely on this ruling and withhold or release the identical information in accordance with Open Records Letter No. 2010-01775. To the extent the requested information was not ruled upon in Open Records Letter No. 2010-01775, the association may withhold the responsive information under section 552.103.

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<sup>2</sup>As our ruling for this information is dispositive, we need not address your remaining argument against disclosure.

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,



Melanie J. Villars  
Assistant Attorney General  
Open Records Division

MJV/bs

Ref: ID# 460500

Enc. Submitted documents

c: Requestor  
(w/o enclosures)