



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 5, 2012

Mr. Nick Lealos
Staff Attorney
Legal Section
Texas Department of Insurance
P.O. Box 149104, Mail Code 110-1A
Austin, Texas 78714-9104

OR2012-17691

Dear Mr. Lealos:

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# 469972 (TDI# 130786).

The Division of Worker's Compensation of the Texas Department of Insurance (the "division") received a request for information pertaining to the requestor's client, including: (1) information related to benefit dispute agreements and contested case hearing decisions pertaining to two specified individuals; (2) information pertaining to insurance carrier disputes of payment; (3) investigative notes regarding any complaints and the identity of the complainants; (4) the division's official disability guidelines and guidelines in effect at the time at issue; and (5) actions taken by the state insurance commissioner to adopt guidelines or amendments to guidelines. You state the division is withholding some information in accordance with a previous determination issued to the division in Open Records Letter No. 2005-00409 (2005).¹ You claim most of the remaining information is

¹Open Records Letter No. 2005-00409 authorizes the division to withhold under section 552.101 of the Government Code in conjunction with section 402.092 of the Labor Code, without the necessity of requesting a decision under the Act, an investigative file maintained under section 414.005 of the Labor Code unless the information is subject to the release provisions found in section 402.092 or other provisions of law or is claim file information subject to section 402.092(c). See Open Records Decision No. 673 (2001) (listing elements of second type of previous determination under section 552.301(a) of the Government Code).

excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note you have not submitted information responsive to categories four and five of the request for information. To the extent any information responsive to these portions of the request existed on the date the division received the request, we assume the division has released it. If the division has not released any such information, it must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under [the Act] or other law:

...

(12) final opinions, including concurring and dissenting opinions, and orders issued in the adjudication of cases[.]

Gov't Code § 552.022(a)(12). We have marked information consisting of orders issued in the adjudication of claims by the division. Although you raise section 552.103 of the Government Code for some of this information, section 552.103 is a discretionary exception to disclosure that does not make information confidential under the Act. *See id.* § 552.007; *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 section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). Therefore, the division may not withhold the information subject to section 552.022 under section 552.103. However, section 552.101 of the Government Code makes information confidential under the Act for purposes of section 552.022. Therefore, we will consider your arguments under section 552.101 for the information subject to section 552.022(a)(12). We will also consider your argument under section 552.103 for the remaining information.

You claim most of the information not subject to section 552.022 of the Government Code is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 provides, in relevant 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). The purpose of section 552.103 is to protect the litigation interests of governmental bodies that are or may become parties to pending or anticipated litigation. *See id.* § 552.103(a); Open Records Decision No. 638 at 2 (1996) (section 552.103 only protects the litigation interests of the governmental body claiming the exception). A governmental body has the burden of providing relevant facts and documents to show section 552.103(a) is applicable 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 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). A 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, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." 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 from disclosure if governmental body attorney determines that it should be withheld pursuant to section 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. We note a contested case before the State Office of Administrative Hearings ("SOAH") is considered litigation for the purposes of the Administrative Procedures Act (the "APA"). *See* Open Records Decision No. 588 at 7 (1991).

You state the information you have marked is related to a pending enforcement action against the requestor's client. You inform us, and the request for information reflects, that failure to reach a settlement through an informal settlement conference will result in a contested

case before SOAH. Accordingly, you assert the division reasonably anticipates litigation as the enforcement action may be disputed before SOAH. Based on your representations and our review, we determine the division reasonably anticipated litigation when it received the request for information. Furthermore, we agree the marked information not subject to section 552.022 relates to the anticipated litigation. Therefore, we conclude the division may withhold the marked information 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 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 concluded or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575; *see also* Open Records Decision No. 350 (1982).

We now address your claims under section 552.101 of the Government Code in conjunction with section 402.083 of the Labor Code for the information subject to section 552.022(a)(12) of the Government Code. Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information made confidential by other statutes. Section 402.083 provides that “[i]nformation in or derived from a claim file regarding an employee is confidential and may not be disclosed by the division except as provided by this subtitle[.]” Lab. Code § 402.083(a). This office has interpreted section 402.083 to protect only that “information in or derived from a claim file that explicitly or implicitly discloses the identities of employees who file workers’ compensation claims.” Open Records Decision No. 619 at 10 (1993). However, we also have stated “[w]hether specific information implicitly discloses the identify of a particular employee must be determined on a case-by-case basis.” *Id.* Prior decisions of this office have found information revealing the date of injury, as well as an injured employee’s name, beneficiary name, commission claim number, social security number, home telephone number, home address, and date of birth implicitly or explicitly identifies claimants and is therefore excepted from disclosure under section 552.101 in conjunction with section 402.083.³ You state the information you have marked is derived from claim files and implicitly or explicitly discloses the identities of employees who have filed workers’ compensation claims. Based on your representations and our review, we find the remaining information we have marked implicitly or explicitly identifies workers’ compensation claimants. Therefore, the division must withhold the

²As our ruling for this information is dispositive, we need not address your remaining arguments against its disclosure.

³The “commission” refers to the predecessor agency of the division, which was established under House Bill 7, 79th Legislature, R.S. (2005).

information we have marked under section 552.101 of the Government Code in conjunction with section 402.083 of the Labor Code. However, we conclude you have not shown the remaining information at issue either implicitly or explicitly identifies employees who have filed workers' compensation claims. Therefore, the remaining information at issue is not confidential under section 402.083 of the Labor Code, and may not be withheld under section 552.101 of the Government Code.

In summary, with the exception of the information subject to section 552.022(a)(12) of the Government Code, the division may withhold the information you have marked under section 552.103 of the Government Code. The division must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 402.083 of the Labor Code. The division must release the remaining information.

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,



Cynthia G. Tynan
Assistant Attorney General
Open Records Division

CGT/tch

Ref: ID# 469972

Enc. Submitted documents

c: Requestor
(w/o enclosures)