



**ATTORNEY GENERAL OF TEXAS**  
**GREG ABBOTT**

January 31, 2013

Mr. Nick Lealos  
Office of Agency Counsel  
Legal Section MC 110-1A  
Texas Department of Insurance  
P.O. Box 149104  
Austin, Texas 78714-9104

OR2013-01820

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# 477669 (TDI No. 133223).

The Texas Department of Insurance (the "department") received a request for all complaint and licensing information regarding a named individual. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

We note a portion 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;

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(12), (17). The submitted information contains final orders issued by the Texas Commissioner of Insurance and court-filed documents that are subject to subsections 552.022(a)(12) and 552.022(a)(17), respectively. The department must release the information subject to section 552.022 unless it is made confidential under the Act or other law. You seek to withhold the information subject to subsection 552.022 under section 552.103 of the Government Code. However, section 552.103 is a discretionary exception and does not make information confidential under the Act. *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 section 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the information subject to section 552.022 may not be withheld under section 552.103 of the Government Code. However, you also raise section 552.101 of the Government Code, which can make information confidential. Therefore, we will consider the applicability of section 552.101 to the information at issue.

Section 552.101 of the Government Code 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 protected by other statutes, such as section 36.252 of the Insurance Code, which provides:

(a) Information or material acquired by the department that is relevant to an investigation is not a public record for the period that the department determines is relevant to further or complete an investigation.

(b) Investigation files are not open records for purposes of [the Act], except as specified herein.

Ins. Code § 36.252. Section 36.251 of the Insurance Code states “investigation file”

means any information collected, assembled, or maintained by or on behalf of the department with respect to an investigation conducted under this code or other law. The term does not include information or material acquired by the department that is:

(1) relevant to an investigation by the insurance fraud unit;  
and

(2) subject to Section 701.151 [of the Insurance Code].

*Id.* § 36.251. You state the submitted information is an enforcement case file that pertains to a pending investigation by the department's enforcement section, and is not, for purposes

of the enforcement action, a closed case. However, upon review, we find the submitted information is relevant to an investigation by the department's insurance fraud unit that is subject to section 701.151 of the Insurance Code. Accordingly, we conclude the information is not part of an investigation file for the purposes of section 36.252 and the department may not withhold any of the submitted information on this basis.

Next, we address your argument under section 552.103 of the Government Code for the information not subject to section 552.022. 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 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 has the burden of providing relevant facts and documents to show 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.); Open Records Decision No. 551 at 4 (1990). 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). We note contested cases conducted under the Administration Procedure Act (the "APA"), chapter 2001 of the Government Code, are considered litigation for purposes of section 552.103. *See* Open Records Decision No. 588 at 7 (1991). We further note a contested case before the State Office of Administrative Hearings ("SOAH") is considered litigation for the purposes of the APA. *See id.*

You state the information at issue is related to a contested case before SOAH between the department and a named licensee. The licensee filed a motion for extension of time to re-open an enforcement action that has been filed against him because he seeks to challenge a default judgement against him by the Commissioner of Insurance. You further explain the

information at issue relates to the subject matter of the pending litigation. Based on your representations and our review, we determine litigation was pending on the date the department received the request for information. Furthermore, we find the information at issue relates to the pending litigation. Accordingly, we find section 552.103 is generally applicable to the information not subject to section 552.022.

However, we note the opposing party in the pending litigation has seen or had access to some 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. Thus, if the opposing party has seen or had access to information relating to 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). Therefore, the department may only withhold the information we have marked under section 552.103 of the Government Code.<sup>1</sup> We also 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).

Section 552.101 also encompasses section 560.003 of the Government Code. Section 560.003 provides that “[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act].”<sup>2</sup> Gov’t Code § 560.003; see *id.* § 560.001(1) (“‘Biometric identifier’ means a retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry”). However, section 560.002 of the Government Code provides that “[a] governmental body that possesses a biometric identifier of an individual . . . may not sell, lease, or otherwise disclose the biometric identifier to another person unless . . . the individual consents to the disclosure[.]” *Id.* § 560.002(1)(A). We have marked a fingerprint in the submitted information. You do not inform us, and the submitted information does not indicate, section 560.002 permits disclosure of the submitted fingerprint information. Therefore, the department must withhold the fingerprint we have marked under section 552.101 of the Government Code in accordance with section 560.003 of the Government Code.

Section 552.130 of the Government Code provides that information relating to a motor vehicle operator’s or driver’s license or permit issued by any agency of this state or another state or country is excepted from public release. Gov’t Code § 552.130(a)(1). Upon review,

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<sup>1</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

<sup>2</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. See Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

we find the department must withhold the driver's license information we have marked under section 552.130 of the Government Code.

In summary, the department may withhold the information we have marked under section 552.103 of the Government Code. The department must withhold the fingerprint we have marked under section 552.101 in conjunction with section 560.003 of the Government Code, and the driver's license information we have marked under section 552.130 of the Government Code. The remaining information must be released.

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,



Britni Fabian  
Assistant Attorney General  
Open Records Division

BF/dls

Ref: ID# 477669

Enc. Submitted documents

c: Requestor  
(w/o enclosures)