



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 9, 2013

Ms. Emily E. Helm
General Counsel
Texas Alcoholic Beverage Commission
P.O. Box 13127
Austin, Texas 78711-3127

OR2013-17568

Dear Ms. Helm:

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# 501824.

The Texas Alcoholic Beverage Commission (the "commission") received two requests from different requestors for information related to two specified businesses and a specified incident. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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, orig. proceeding); *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 inform us the submitted information relates to a pending enforcement action against one of the specified businesses. You state the business is a permit holder and the commission has issued two citations to the business. You inform us that failure to reach a settlement regarding the administrative violations will result in a contested case before SOAH. You state, as of the date of the request, the administrative violations have not been settled. Accordingly, you assert the commission reasonably anticipates litigation as the enforcement action may be disputed before SOAH. Based on your representations and our review, we determine the commission reasonably anticipated litigation when it received the request for information. Furthermore, we agree the submitted information relates to the anticipated litigation.

However, if the opposing party to litigation has already seen or had access to information relating to the litigation through discovery or otherwise, then there is no interest in withholding such information from the public under section 552.103. *See* Open Records Decision Nos. 349 at 2 (1982), 320 at 1 (1982). In this instance, the submitted information includes a citation that was given to the opposing party in the anticipated litigation. Accordingly, this information has been seen by the opposing party in the anticipated litigation, and the commission may not withhold this information under section 552.103 of the Government Code. *See id.* Therefore, with the exception of the citation, which we have marked, the commission may withhold the submitted information under section 552.103 of the Government Code.¹

You assert the remaining information is excepted under section 552.108(a)(1) of the Government Code. Section 552.108(a)(1) of the Government Code excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime[.]” Gov’t Code § 552.108(a)(1). A governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See id.* §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). Where a governmental body possesses information relating to a pending case of a different law enforcement agency, the custodian of the records may withhold the information under section 552.108 only if it provides this office with (1) a demonstration that the information relates to the pending case, and (2) a representation from the entity with the law enforcement interest stating that entity wishes to withhold the information.

You state the citation at issue relates to an ongoing criminal prosecution for intoxication manslaughter. We note, however, the submitted information shows the Irving Police Department conducted the manslaughter investigation that is pending prosecution. The commission has not explained that it conducted a criminal investigation that resulted in the pending prosecution nor has it explained what law enforcement interest it has in the pending prosecution. Additionally, the commission has not provided this office with a representation from an entity with a law enforcement interest stating the agency objects to disclosure of the information at issue. Accordingly, we find you have failed to demonstrate the applicability of section 552.108(a)(1) of the Government Code to the remaining information, and the remaining information may not be withheld on that basis.

In summary, with the exception of the citation we have marked, which must be released, the commission may withhold the submitted information under section 552.103 of the Government Code.

¹As our ruling for this information is dispositive, we need not address your remaining argument against its 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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read "Michelle R. Garza", with a long horizontal flourish extending to the right.

Michelle R. Garza
Assistant Attorney General
Open Records Division

MRG/som

Ref: ID# 501824

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)