



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 16, 1994

Mr. J. Robert Hunter
Commissioner
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

Letter Opinion No. 94-069

Re: Whether the attorney general or the in-house counsel of a state agency is the proper party to raise the litigation exception of the Open Records Act where the litigation is in a quasi-judicial forum (ID# 25510)

Dear Commissioner Hunter:

The Department of Insurance received a request under the Open Records Act, Gov't Code ch. 552, for records relating to its investigation of a particular insurance company and its subsidiaries. We understand that the particular request is moot, but the requestor raised a question that you would like us to answer.

The requestor asked for any documents that contained public information concerning a specific insurance company. He asked whether the agency was conducting an investigation of the company and also asked the following questions about the investigation:

Under what authority is the investigation being conducted?

What is the purpose of this inquiry?

What information began the investigation?

Who has been contacted during the investigation?

Why does the agency think the insurance company is an unauthorized insurer?

The Open Records Act does not require a governmental body to prepare answers to questions or to do legal research. *See* Open Records Decision Nos. 563; 555 (1990). If the request is overbroad, the governmental body should advise the requestor of the types of information available so that he may narrow his request. Open Records Decision No. 31 (1974). Nonetheless, the agency did not object to confirming the existence of an investigation, the purpose of that inquiry, and the authority under which it was conducted. It refused to divulge information relevant to the other questions, claiming that it was

exempt from disclosure as information related to anticipated litigation.¹ Section 552.103, the litigation section, provides an exception for information

(1) relating to litigation of a civil or criminal nature or settlement negotiations, 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; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

A contested case under the Administrative Procedure Act ("APA"), Gov't Code ch. 2001,² has been determined to be "litigation" within section 552.103 of the Government Code. Open Records Decision No. 588 (1991). The department, an agency subject to APA, *see* Open Records Decision No. 588, at 7, anticipated holding an administrative proceeding to determine whether the insurance company had violated the Insurance Code. However, the requestor questioned the department's reliance on section 552.103, because neither the attorney general nor the attorney of a political subdivision had determined that the information should be withheld from public inspection. *See* Gov't Code § 552.103(2). You ask the following question:

[W]hen a state agency receives an open records request for information related to administrative litigation, does the attorney general or the agency attorney make the initial determination under the Open Records Act . . . that [the] information should be withheld from inspection?

Section 552.103 of the Government Code expressly applies to information that "the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection." Taken literally, only the attorney general may initially determine that requested information is related to litigation to which the state is a party. However, when the state brings a criminal prosecution, this office has long held that the prosecutor who is handling the suit should make the initial determination under section 552.103 that the requested information relates to criminal litigation. Open Records Decision No. 121 (1976) dealt with a request for financial records of the Division of

¹Since this request is moot, we need not address the documents that are relevant to the three remaining questions.

²The Administrative Procedure Act, formerly codified as article 6252-13a, V.T.C.S. (1925), was codified as chapter 2001 of the Government Code in a nonsubstantive revision of statutes relating to areas of government that affect both state and local entities. Acts 1993, 73d Leg., ch. 268.

Extension of the University of Texas at Austin. Many of the records were in the custody of the Travis County District Attorney, who was reviewing them in light of pending criminal charges. The university raised the litigation exception for these records and this office stated as follows:

The statute contemplates that the attorney for the State in the litigation will make the determination whether the information should be released. In this case the attorney for the State is the District Attorney of Travis County

Open Records Decision No. 121 at 2; *see also* Open Records Decisions No. 469 (1987); 141 (1976).

Open Records Decision No. 588, in holding that a contested case under APA was "litigation" for purposes of section 552.103 of the Government Code, relied on a Texas Supreme Court decision concluding that "courts" in article IV, section 22, of the Texas Constitution included an administrative forum. *See State v. Thomas*, 766 S.W.2d 217 (Tex. 1989). This office stated as follows:

The court's description [in *State v. Thomas*, 766 S.W.2d 217 (Tex. 1989),] of the agency's role in the adjudicative process supports the determination of this office that "litigation" within section 3(a)(3) of the Open Records Act [(Government Code § 552.103)] includes a contested case before an administrative agency. It stated that a ratemaking proceeding is a "contested case" within the meaning of the Administrative Procedure and Texas Register Act (APTRA); that is, a formal adjudicative proceeding in which the agency performs in a quasi-judicial function. V.T.C.S. art. 6252-13a, §§ 3(2), 13 [(Government Code §§ 2001.003, 2001.051, 2001.052, 2001.056-060)]. . . . The dispute is, for all practical purposes, litigated in the agency, where the evidence is heard and the record is made. . . . [T]he court usually serves as the appellate tribunal for such cases, not as the forum for resolving a controversy on the basis of evidence.

Open Records Decision No. 588 at 3-4.

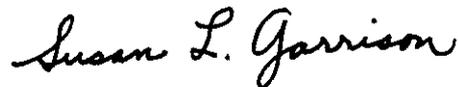
It is the attorney general's responsibility to represent the State in court. *See* Tex. Const. art. IV, § 22; Gov't Code § 402.021; Ins. Code art. 1.19. The assistant attorney general who represents a state agency in court generally makes the initial determination whether the requested records are related to litigation. *See* Open Records Decision Nos. 383 (1983); 135 (1976). In contested cases under APA, in which the dispute is essentially litigated in the agency, the agency attorney represents the state agency in the administrative forum. In our opinion, the agency attorney should make the initial

determination pursuant to section 552.103 of the Government Code. He or she is in the best position to know what the issues are and which records are related to those issues. The agency attorney's decision that information should be withheld pursuant to section 552.103 of the Government Code is reviewed by the attorney general in determining whether the records should be open to the public. Open Records Decision No. 551 (1990); see Gov't Code § 552.306.

S U M M A R Y

When a state agency receives an open records request for information related to administrative litigation, the agency attorney determines pursuant to section 551.103 of the Government Code that the information should be withheld from inspection. This determination is reviewed by the attorney general in determining whether the information is open to the public under the Open Records Act.

Yours very truly,



Susan L. Garrison
Assistant Attorney General
Opinion Committee