



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

February 29, 1996

Mr. John S. Schneider, Jr.  
First Assistant City Attorney  
City of Pasadena  
P. O. Box 672  
Pasadena, Texas 77501

OR96-0281

Dear Mr. Schneider:

You have asked this office to determine if information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. The City of Pasadena (the "city") received a request for information concerning a specific public employee and other employees of the city's Health Department. We assigned your request ID# 38349.

*The City received a request for the following information:*

1. The names, salary, and titles of all those employed by the health department for each of the last 10 years. In the case of Mary Ann McFadden, the requestor also wants the positions and titles held for each of those 10 years;
2. A copy of any public notices that might have been posted before filling the job of Assistant Health Director, on October 1, 1993; and,
3. The names of all women who have held department head positions, the dates of their employment, positions held, and the respective salaries.

We have examined the information submitted to us for review. You assert that *all* of the information submitted is excepted from required public disclosure under section 552.103 of the Government Code based on a lawsuit styled *Mary Ann McFadden v. City of Pasadena*, Civil Action H-94-3752, in the United States District Court for the Southern District of Texas, Houston Division.

Section 552.103(a) excepts from required public disclosure 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.

Section 552.103(a) was intended to prevent the use of the Open Records Act as a method of avoiding the rules of discovery in litigation.<sup>1</sup> Attorney General Opinion JM-1048 (1989) at 4. The litigation exception enables a governmental body to protect its position in litigation by requiring information related to the litigation to be obtained through discovery. Open Records Decision No. 551 (1990) at 3. Although section 552.103(a) gives the attorney for a governmental body discretion to determine whether section 552.103(a) should be claimed, that determination is subject to review by the attorney general. Open Records Decision Nos. 551 (1990) at 5; 511 (1988) at 3.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation "to which the state or a political subdivision is or may be a party." The City has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation.<sup>2</sup> To show the applicability of section 552.103, a governmental entity must show that (1) litigation is pending or reasonably anticipated, and that (2) the information at issue is related to that litigation. *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 (1990) at 4. The City must meet both prongs of this test for the information to be excepted under section 552.103(a). You have submitted a copy of Mary Ann McFadden's "Complaint" for our review. Accordingly, you have satisfied the first prong by demonstrating that the City is a party to the pending litigation.

In order to secure the protection of the "litigation exception, the second prong of section 552.103(a) requires that a governmental body demonstrate that requested

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<sup>1</sup> The Open Records Act is not a substitute for the discovery process under the Texas Rules of Civil Procedure. See Attorney General Opinion JM-1048 (1989) at 3 ("the fundamental purposes of the Open Records Act and of civil discovery provisions differ"); Open Records Decision No. 551 (1990) at 3-4 (discussion of relation of Open Records Act to discovery process).

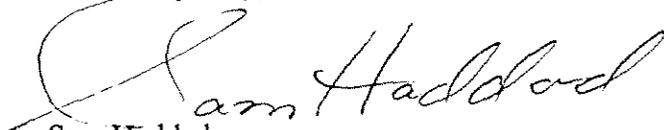
<sup>2</sup> We note that the governmental body claiming an exception is responsible for submitting in writing the reasons it believes the requested information is excepted from disclosure. Attorney General Opinion H-436 (1974). If a governmental body does not claim an exception or *fails to show how it applies to the records*, it will ordinarily waive the exception unless the information is made confidential under the Open Records Act. See Attorney General Opinion JM-672 (1987).

information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision Nos. 588 (1991), 551 (1990). You assert that section 552.103 applies, because the information sought by the requestor relates to the litigation in which the City is a party, as evidenced by Mary Ann McFadden's complaint. In this instance you have made the requisite showing that items one and three of the requested information relate to pending litigation for purposes of section 552.103(a), and the requested records may therefore be withheld.<sup>3</sup>

As for the second item on the request list, regarding the public notices for the position of Assistant Health Director, if there was a public notice posted, then the city cannot now withhold it from disclosure. Cf. Open Records Decision No. 221 (1979). Finally, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Sam Haddad  
Assistant Attorney General  
Open Records Division

SH/ch

Ref.: ID# 38349

Enclosures: Submitted documents

cc: Tanya Eiserer, Reporter  
Michael Simmons, Managing Editor  
Pasadena Citizen  
102 South Shaver Street  
Pasadena, Texas 77506  
(w/o enclosures)

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<sup>3</sup> If the opposing parties in the litigation have seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982).