



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

April 27, 1998

Mr. Merrill E. Nunn
City Attorney
City of Amarillo
509 S.E. Seventh Avenue
Amarillo, Texas 79105-1971

OR98-1039

Dear Mr. Nunn:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 115058.

The City of Amarillo (the "city") received a request for the personnel file of a former employee. The requestor also seeks any tapes where the former employee was recorded by city officers. The requestor is an attorney who represents the former employee. You indicate that you will release the employee's personnel file. You assert, however, that because the requested tapes are not in the employee's personnel file, but rather in the hands of other city employees, the requestor does not have a right to the tapes under the Open Records Act. In the alternative, you claim that the requested information is excepted from disclosure by section 552.103 of the Government Code.

You initially claim that the city need not release the requested tape because it is not subject to the Open Records Act. Section 552.002 of the Government Code defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." You explain that the tape recording is not in the personnel file, but is "in the hands of the individuals who made the tapes." You have submitted the recording to our office for review. It appears in this case that the city maintains the recordings and has a right of access to it. We conclude, therefore, that the recordings are public information subject to public disclosure under the Open Records Act.

You next claim that the recordings are excepted from required public disclosure by section 552.103 of the Government Code. Section 552.103(a) excepts from 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.

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. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (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 information to be excepted under 552.103(a).

In this instance, you assert that the city reasonably anticipates litigation with the requestor's client. The former employee's attorney, in his request for information, has made several demands of the city on behalf of the former employee. He has asked the city to enter into a compromise and settlement agreement. The requestor states that "If we do not hear from you or if you are unwilling to engage in an amicable resolution of this matter please advise so that we may refer this matter to litigation." The city has declined the offer. We find that you have shown that litigation is reasonably anticipated. Open Records Decision Nos. 346 (1982), 288 (1981). Based on the letters you have submitted to this office, it also appears that the requested information relates to the anticipated litigation. You may withhold the requested recordings under section 552.103.

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. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, 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 should 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,

A handwritten signature in black ink that reads "Don Ballard". The signature is written in a cursive, slightly slanted style.

Don Ballard
Assistant Attorney General
Open Records Division

JDB/ch

Ref: ID# 115058

Enclosures: Submitted Tape

cc: Mr. Sam L. Fadduol
Fadduol, Glasheen & Valles, P.C.
1115 Broadway
Lubbock, Texas 79408
(w/o enclosures)