



March 16, 2000

Mr. David B. Casas  
Assistant City Attorney  
City of San Antonio  
P.O. Box 839966  
San Antonio, Texas 78283-3966

OR2000-1067

Dear Mr. Casas:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 133294.

The City of San Antonio (the "city") received a request for the personnel files and the academy training files for eleven named individuals. You have provided for our review the personnel files and academy training files of two of the named individuals as representative samples of the information that is responsive to the request.<sup>1</sup> You assert that the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you assert and reviewed the submitted information.

Section 552.103, the "litigation exception," excepts from disclosure information:

[R]elating 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.

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<sup>1</sup>In reaching our conclusion here, we assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988); 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that information submitted to this office.

[Information is excepted from disclosure] 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. The litigation exception was intended to prevent the use of the Public Information Act as a method of avoiding the rules of discovery in litigation.<sup>2</sup> Attorney General Opinion JM-1048 at 4 (1989). 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 at 3 (1990).

The city has the burden of providing relevant facts and documents to show that the section 552.103 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. *University of Tex. Law Sch. v. Texas 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). The city must meet both prongs of this test for information to be excepted under section 552.103.

In support of your section 552.103 assertion, you have submitted to this office petitions for two cases that you advise are pending in federal court, and in which the city is a named defendant. You have thus shown that litigation is pending. We next determine whether the information relates to the pending litigation.

In one petition, the requestor is indicated to be the plaintiff. The requestor alleges his employment as a firefighter with the city was terminated on the basis of his national origin, and in retaliation for his engaging in activities protected by the U.S. Constitution. In the other petition, the plaintiff, who is not the requestor, alleges the city's selection process for firefighter trainees and firefighters has resulted in a disparate impact which excludes individuals on the basis of their sex, that the city intentionally discriminated against the plaintiff on the basis of her sex, and that the plaintiff was terminated from her employment as a firefighter in retaliation for her engaging in activities protected by the U.S. Constitution. Because the information at issue consists of the training and personnel files of firefighters and firefighter trainees, we agree that the requested information relates to the pending litigation. Thus, the city has met its burden of showing both that litigation is pending or reasonably anticipated and that the information at issue relates to the litigation. We therefore conclude the requested information may be withheld pursuant to section 552.103.

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<sup>2</sup>The Public Information Act is not a substitute for the discovery process under the Texas Rules of Civil Procedure. See Attorney General Opinion JM-1048 at 3 (1989) (the fundamental purposes of the Public Information Act and of civil discovery provisions differ); Open Records Decision No. 551 at 3-4 (1990) (discussion of relation of Public Information Act to discovery process).

In reaching this conclusion, however, we assume that the opposing parties to the pending litigation have not previously had access to the records at issue. Absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). If the opposing parties in the pending 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. We also note that the applicability of section 552.103 ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Finally, some of the information at issue may be confidential by law or may implicate the proprietary interest of a third party. Therefore, if the city receives a request in the future, at a time when litigation is no longer pending, the city should seek a ruling from this office before releasing any of the requested information. *See* Gov't Code § 552.352 (providing for criminal penalties for the release of confidential information). Because section 552.103 is dispositive, we do not address your additional arguments against disclosure.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

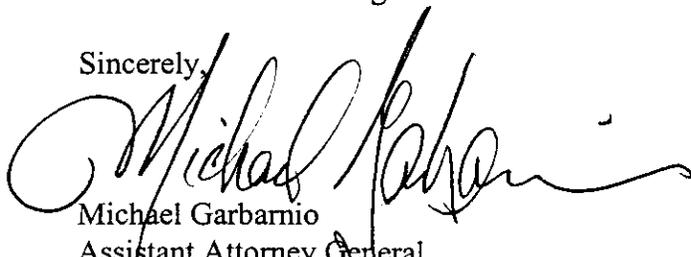
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839.

The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael Garbarnio  
Assistant Attorney General  
Open Records Division

MG/ch

Ref: ID# 133294

Encl. Submitted documents

cc: Mr. Samuel Andrade, Jr.  
6707 Slate Valley  
San Antonio, Texas 78242  
(w/o enclosures)