



June 5, 2001

Ms. Nanette G. Williams  
Assistant City Attorney  
City of El Paso  
2 Civic Center Plaza  
El Paso, Texas 79901-1196

OR2001-2322

Dear Ms. Williams:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 148013.

The City of El Paso (the “city”) received a written request for all records pertaining to an “audit” allegedly presented to the city council on March 13, 2001. You state that in fact no audit or any other documents were presented to the city council on that date, but rather that the city council received an oral presentation from legal counsel regarding an administrative hearing currently pending before the Public Utility Commission (the “PUC”). You first argue that, because there was no “audit” presented to the city council, there exist no records responsive to the request as written.

When a requestor makes a vague or confusing request, a governmental body should make a good faith effort to identify responsive documents and then advise the requestor of the type of documents available so that the requestor may narrow or otherwise clarify the request. *See* Open Records Decision No. 87 (1975). In this instance, the requestor has notified this office to clarify that in fact he wishes to obtain information pertaining to the oral presentation to the city council. You advise that the city maintains two records that pertain to the oral presentation: a tape recording of the presentation and the “draft” testimony to be presented to the PUC during the administrative hearing. You contend that these records are excepted from public disclosure pursuant to sections 552.101, 552.103, and 552.107(1) of the Government Code.

We first address the tape recording of the attorney's presentation to the city council. You explain that the tape recording was made during an executive session of the city council. You contend that the tape recording is made confidential under the Texas Open Meetings Act, chapter 551 of the Government Code, and therefore must be withheld from the public pursuant to section 552.101 of the Government Code.<sup>1</sup> Section 551.022 of the Government Code specifically provides:

The minutes and tape recordings of *an open meeting* are public records and shall be available for public inspection and copying on request to the governmental body's chief administrative officer or the officer's designee. [Emphasis added.]

On the other hand, the tape recording of an executive session of a city council meeting must be withheld in its entirety. Section 551.104(c) of the Government Code provides that the certified agenda and tape recording of an executive session is available for public inspection only under a court order requiring such a release. Accordingly, the city must withhold the tape recording at issue absent a court order instructing it to do otherwise. *See also* Open Records Decision No. 495 (1988) (Open Meetings Act removes certified agendas and tapes of executive sessions from review by the attorney general under Public Information Act).

You next contend that the "draft" testimony on which the oral presentation was based is excepted from required public disclosure pursuant to section 552.103 of the Government Code. Section 552.103(a) excepts from disclosure information relating to litigation to which a governmental body is or may be a party. Additionally, the litigation must have been pending or reasonably anticipated on the date that the governmental body received the records request. Gov't Code § 552.103(c).

The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. In order to meet this burden, the governmental body must show 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 (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).

You have provided this office with pleadings from the PUC hearing that establish that the city was a party to this hearing at the time the city received the current records request. This office has determined that a contested case under the Administrative Procedure Act, Government Code chapter 2001, constitutes "litigation" for purposes of section 552.103. *See* Open Records Decision Nos. 588 (1991) (former State Board of Insurance proceeding), 301

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<sup>1</sup>Section 552.101 of the Government Code protects "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

(1982) (hearing before Public Utilities Commission). Furthermore, after reviewing the “draft” testimony, we conclude that this information “relates” to the issues to be addressed in the administrative hearing. Accordingly, we conclude that you have demonstrated that the testimony “relates” to currently pending litigation to which the city is a party. The city therefore may withhold the “draft” testimony pursuant to section 552.103(a) of the Government Code.<sup>2</sup>

In reaching this conclusion, we assume that the other parties to the administrative hearing have not had access to the testimony. 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). We also note that the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the city must withhold the tape recording of the oral presentation pursuant to section 551.104(c) of the Government Code. Additionally, the city is authorized to withhold pursuant to section 552.103 the “draft” testimony on which the oral presentation was based, but only if this testimony has not yet been provided to the other parties in the administrative hearing.

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

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<sup>2</sup>Because we resolve this aspect of your request under section 552.103, we need not address the applicability of section 552.107(1) to this information.

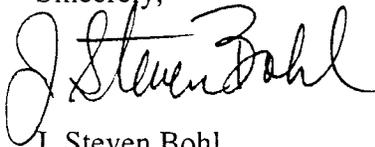
provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to 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).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

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,



J. Steven Bohl  
Assistant Attorney General  
Open Records Division

JSB/RWP/seg

Ref: ID# 148013

Enc. Submitted documents

c: Mr. Richard A. Román  
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(w/o enclosures)