



July 24, 2001

Ms. Myrna S. Reingold
Galveston County Legal Department
4127 Shearn Moody Plaza
123 Rosenberg
Galveston, Texas 77550-1454

OR2001-3203

Dear Ms. Reingold:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 149784.

The Galveston County Judge (the "Judge") received a request for seventeen categories of information pertaining to a named individual and to county employment practices. You claim that the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.117, 552.024, and 551.104 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments made on the requestor's behalf. Gov't Code §552.304.

You claim that some information responsive to the request is contained in a tape recording of an executive session of the Commissioners' Court, and is therefore confidential under section 551.104 of the Government Code, a provision of the Open Meetings Act. You did not submit the tape recording to this office in connection with your request for this ruling. *See* Open Records Decision No. 495 at 4 (1988) (concluding that Open Meetings Act provisions remove certified agendas and tapes of executive sessions from review by attorney general under the Public Information Act).

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses information that is made confidential by other statutes. Section 551.104 of the Government Code makes the certified agenda or tape recording of a lawfully closed meeting confidential. A certified agenda or tape recording of a closed

meeting is available for public inspection and copying only under a court order issued under section 551.104. *See* Gov't Code § 551.104(c); Open Records Decision No. 495 at 4 (1988). Section 551.146 of the Open Meetings Act makes it a criminal offense to disclose a certified agenda or tape recording of a lawfully closed meeting to a member of the public. Thus, a certified agenda or tape recording of a properly closed executive session of the Commissioner's Court is confidential under section 552.101 of the Government Code in conjunction with section 551.104 of the Government Code, a provision of the Open Meetings Act. *See* Open Records Decision No. 495 (1988). You claim that a recording was made in a closed meeting of the court. Based on your representation, we conclude that you must withhold that recording under section 552.101 of the Government Code in conjunction with section 551.104 of the Government Code.

We also note that the minutes, tape recordings, and agendas of a governmental body's public meetings are specifically made public by statute. *See* Gov't Code § 551.022. Information made specifically public by statute may not be withheld from disclosure by any exceptions to disclosure under the Public Information Act. *See, e.g.*, Open Records Decision Nos. 544 (1990), 378 (1983), 161 (1977), 146 (1976). Accordingly, the Judge must release the marked Commissioners Court meeting agenda.

We next note that the submitted materials include information made public by section 552.022 of the Government Code. This section provides several categories of information that are not excepted from required disclosure unless they "are expressly confidential under other law." In pertinent part this section reads

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

- ...
- (5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate[.]

The submitted materials include receipts and vouchers; the names, salaries, titles, and dates of employment of county employees; a completed performance audit; and information used to estimate the need for or expenditure of public funds. All of the records relating to the performance audit are subject to required release under section 552.022(a)(1), while the receipts and vouchers fall within the scope of subsection (3) of section 552.022(a). The information used to estimate the need for or expenditure of public funds is made public pursuant to section 552.022(a)(5), and the names, salaries, titles, and dates of employment of county employees are included in the purview of subsection (2) of section 552.022(a). The submitted information which is within the ambit of section 552.022 is therefore subject to required public disclosure, except to the extent that any of this information is expressly confidential under other law. Although you claim that section 552.103 of the Government Code applies to all of the submitted information, it is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. As such, this exception does not constitute other law that makes information expressly confidential for the purposes of section 552.022(a). *See* Open Records Decision Nos. 542 at 4 (1990) (statutory predecessor to section 552.103 does not implicate third-party rights and is waivable by governmental body). We have marked the information which must be released.

With regard to the remaining information, we address your section 552.103 arguments. 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 Judge 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. *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 Judge must meet both prongs of this test for information to be excepted under section 552.103(a).

The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish *concrete* evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

You have submitted information to this office showing that the named individual has filed a complaint with the Texas Commission on Human Rights (the "TCHR") alleging discrimination. The TCHR operates as a federal deferral agency under section 706(c) of title VII, 42 U.S.C. § 2000e-5. The Equal Employment Opportunity Commission ("EEOC") defers jurisdiction to the TCHR over complaints alleging employment discrimination. *Id.*

This office has stated that a pending EEOC complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982). Although processing of the complaint filed with the TCHR has been terminated by the Commission, you indicate that the named individual has now hired an attorney, who has made the instant request for information. You have shown that litigation is reasonably anticipated. Our review of the records at issue also shows that they are related to anticipated litigation for purposes of section 552.103(a). Thus, you may withhold the remainder of the requested information pursuant to section 552.103(a).

It appears that a portion of the information at issue has already been seen by the opposing party. We note that once the information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note that the applicability of section 552.103(a) ends when the litigation is concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

Because section 552.103 is dispositive, except as to information already seen by opposing parties, we need not address the applicability of your other claimed exceptions.

In summary, the Judge must withhold the tape recording of an executive session of the Commissioners' Court under section 551.104. The Judge must release the marked information which is expressly made public under section 552.022, and the Commissioners' Court meeting agenda under section 551.104. With the exception of any information already seen by the opposing party, the remainder of the submitted records may be withheld pursuant to section 552.103.

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).

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/seg

Ref: ID# 149784

Enc. Submitted documents

c: Mr. Mark Siurek
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(w/o enclosures)