



December 7, 2001

Mr. Bill Crow
Corporate Counsel
San Antonio Water System
P.O. Box 2449
San Antonio, Texas 78298-2449

OR2001-5729

Dear Mr. Crow:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 155860.

The San Antonio Water System (the "system") received a request for a list of all employees in the Water Treatment Programs Department and their performance scores for the years 1999 and 2001. We understand you to assert that the requested performance scores are excepted from disclosure under sections 552.102 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.¹

You indicate that there is a "lack of clarity" in the portion of the request seeking "[a] list of all employees that in the Water Treatment Programs department[.]" We note that if what information is requested is unclear to a governmental body, the governmental body may ask the requestor to clarify the request. Gov't Code § 552.222(b). To the extent the information being requested in the present request is unclear to the system, the system should thus seek clarification from the requestor. Because you also indicate that the system has no objection to releasing a list of names of the employees in the Water Treatment Programs Department, and that the system has previously released to the requestor a personnel directory of all system employees, we assume that the information responsive to the above-referenced portion of the present request has been or will be released to the requestor. *See also* Gov't Code § 552.022(a)(2) (requiring release, unless confidential under other law, of name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body).

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole that contain information responsive to the request. *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 submitted to this office.

As to the requested performance scores, you assert section 552.103, the "litigation exception."² In pertinent part, section 552.103 states that it excepts from disclosure "information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party" and requires that litigation involving the governmental body be "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(a), (c). The system 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 involving the system 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 system must meet both prongs of this test for information to be excepted under section 552.103.

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). This office has concluded that litigation was reasonably anticipated when the potential opposing party filed a complaint with the Equal Employment Opportunity Commission. *See* Open Records Decision No. 336 (1982). You demonstrate that in this instance, a system employee filed such a complaint prior to the department's receipt of the present request. The complaint alleges illegal retaliation against the employee by the system. The EEOC investigation of the complaint was evidently pending at the time the information was requested, and we have received no indication that the matter has since been resolved. You further represent that on the date the system received the present request, the system was notified that the employee would be "adding the issue of her annual performance appraisal score to her existing EEOC complaint." Based on your arguments and representations, we conclude that the system has met both prongs of the section 552.103 test in this instance.

Generally, however, once information has been obtained by all opposing parties to the litigation through discovery or otherwise, no section 552.103 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. You indicate that the employee's performance scores that are responsive to the request have previously been made available to her. Accordingly, this information is not protected under section 552.103 and, as noted below, must be released. On the assumption that the remaining responsive performance scores have not previously been made available to the opposing party in the

²The submitted sample documents contain other information, none of which appears to be responsive to the request. Because the system is not required under the Public Information Act to release non-responsive information, we do not address this information.

anticipated litigation, we conclude the system may withhold that information at this time pursuant to section 552.103. We further note, however, 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).

With respect to the employee's performance scores, we address the section 552.102 assertion. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Act. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), cert. denied, 430 U.S. 931 (1977). In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Id.* at 685. We do not believe the requestor's performance scores meet this test. Accordingly, this information is not excepted from disclosure under section 552.102 and it must be released.

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

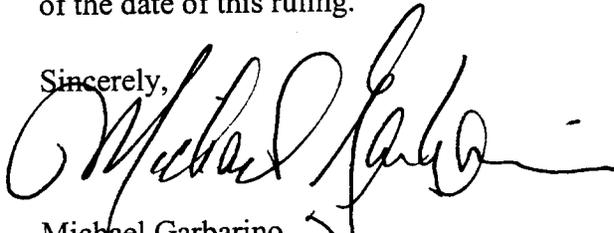
fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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 Texas Building and Procurement 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,



Michael Garbarino
Assistant Attorney General
Open Records Division

MG/sdk

Ref: ID# 155860

Enc. Submitted documents

c: Ms. Connie Porras
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(w/o enclosures)