



December 14, 2001

Mr. Jesús Toscano, Jr.
Administrative Assistant City Attorney
City of Dallas
1500 Marilla
Dallas, Texas 75201

OR2001-5848

Dear Mr. Toscano:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 156159.

The City of Dallas (the "city") received a request for the job analyses for Fire Lieutenant and Fire Captain in the city's Fire Department. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. Further, you indicate that the request may implicate the privacy or proprietary interests of a third party, Management Scientists II. Consequently, you notified Management Scientists II of the request pursuant to section 552.305 of the Government Code. We note, however, that Management Scientists II has not submitted any arguments to our office in response. We have considered the exception you claim and reviewed the submitted information.¹

You argue that section 552.103 of the Government Code excepts the requested information from public disclosure. Section 552.103 provides as follows:

¹We 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 submitted to this office.

(a) Information is excepted from [required public disclosure] if it is information relating 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.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) 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.

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. *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 552.103(a).

You inform us that you previously sought an open records decision from this office with regard to an open records request for a specific employee's Fire Operations Lieutenant Oral Assessment file. This office assigned your request ID# 137394 and issued a ruling, Open Records Letter No. 2000-2829 (2000), in which we found that while a portion of the submitted information was excepted under section 552.122, other portions were not. Now, you have a pending lawsuit filed against the Office of the Attorney General over the release of the information in question in Open Records Letter No. 2000-2829 (2000).² You assert that the job analyses at issue here were the basis for the assessment center which is the subject of that lawsuit.

You point to the current litigation between the city and the Office of the Attorney General as evidence of pending litigation. We agree that you have adequately demonstrated that the city is currently involved in litigation. Under the second prong of the section 552.103 test, you state that the submitted information "concern[s] the subject matter of the litigation, which is two open records requests for information relating to the assessment center conducted in April 2000, for promotions of lieutenant and captain in the Dallas Fire Department." Additionally, you have submitted a statement from the city attorney in charge

²The style of the pending case is *City of Dallas v. Cornyn*, No. GV001999 (53d Judicial District Court, Travis County, Tex. Aug. 16, 2000).

of the litigation in which the attorney indicates that the requested information relates to the pending litigation and is therefore excepted under section 552.103. Based on your arguments and our review of the submitted information, we agree that the submitted information at issue in this file relates to pending litigation. Therefore, you may withhold the submitted information at issue under section 552.103.

We note, however, that 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.³ 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).

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.

³We note that your submission of the information to this office for the purpose of obtaining a decision under section 552.301(e) of the Government Code does not constitute a release to the opposing party for the purpose of section 552.103(a) of the Government Code.

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/seg

Ref: ID# 156159

Enc. Submitted documents

c: Ms. Barbara L. Emerson
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Dallas, Texas 75201
(w/o enclosures)