



February 12, 2002

Mr. William S. Nail
Deputy Executive Director
Employees Retirement System of Texas
P.O. Box 13207
Austin, Texas 78711-3207

OR2002-0646

Dear Mr. Nail:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 158510.

The Employees Retirement System of Texas (the “system”) received a request for all documents in the requestor’s file, as well as “all documents currently submitted to the Texas Attorney General for review.” You indicate that the system has already sought a decision from this office with respect to the information in the requestor’s file. Further, you claim that the system’s brief submitted along with the previous request for a decision is excepted from disclosure under each and every exception previously asserted — sections 552.101, 552.103, 552.107, 552.108, and 552.111 of the Government Code, Rule 503 of the Texas Rules of Evidence, and Rule 192.5 of the Texas Rules of Civil Procedure. You also claim that this brief is excepted under section 552.3035 of the Government Code. We have considered your arguments and reviewed the submitted information.

In Open Records Letter No. 2002-0346 (2002), we concluded that the system could not withhold the information in the requestor’s file from the requestor. Therefore, as the four criteria for a “previous determination” established by this office in Open Records Decision No. 673 (2001) have been met, we conclude that we need not revisit the information in the requestor’s file.¹ The commission must release those documents in accordance with Open Records Letter No. 2002-0346 (2001). *See* Gov’t Code § 552.301(f); Open Records Decision No. 673 (2001).

¹The four criteria for this type of “previous determination” are 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code; 2) the governmental body that received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the attorney general’s prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling. *See* Open Records Decision No. 673 (2001).

We will now address your claimed exceptions with respect to the brief submitted with the system's previous request for a decision and Exhibit "A-1" to that brief, copies of which you have submitted in Exhibit 2. Section 552.103 of the Government Code provides as follows:

(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 system 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 system must meet both prongs of this test for information to be excepted under 552.103(a). For purposes of section 552.103(a), this office considers a contested case under the Texas Administrative Procedure Act ("APA"), Government Code chapter 2001, to constitute "litigation." Open Records Decision No. 588 at 7 (1991) (construing statutory predecessor to APA).

You explain that the requestor is an appellant in a contested case under the APA involving the system and the appellant. A review of the submitted information indicates that this appeal was filed prior to the system's receipt of the present request. Therefore, based on your arguments and our review of the submitted information, we conclude that the system has shown that litigation, in the form of a contested case under the APA, was pending prior to the receipt of the present request for information. We further conclude that the brief submitted with the system's previous request for a decision and Exhibit "A-1" to that brief, copies of which you have submitted in Exhibit 2, relate to the pending litigation for purposes of section 552.103(a). Therefore, such information may be withheld under section 552.103.²

² As we are able to make this determination, we need not address your remaining claimed exceptions.

Generally, however, 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 pending litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, 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).

To summarize, we conclude that: (1) the system must release the documents in the requestor's file in accordance with Open Records Letter No. 2002-0346 (2001); and (2) the system may withhold the brief submitted with the system's previous request for a decision and Exhibit "A-1" to that brief under 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 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,



Karen A. Eckerle
Assistant Attorney General
Open Records Division

KAE/sdk

Ref: ID# 158510

Enc: Submitted documents

c: Mr. Juan Lozano
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San Antonio, Texas 78227
(w/o enclosures)