



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 8, 2004

Ms. Carol Longoria
Office of the General Counsel
University of Texas System
201 West Seventh Street
Austin, Texas 78701-2902

OR2004-0116

Dear Ms. Longoria:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"). Your request was assigned ID# 193808.

The University of Texas at San Antonio (the "university") received a request for two particular letters addressed to the requestor and "any other document that pertains to my commission." You state that the university does not maintain one of the requested letters and that, because the requestor does not have a public art commission from the university, the university has no documents responsive to this aspect of the request.¹ You claim that the other requested letter does not constitute "public information" that is subject to the Act. In the alternative, you assert that this letter is excepted from disclosure under sections 552.103 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

The Act applies to "public information," which is defined under section 552.002 as:

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

(1) by a governmental body; or

¹It is implicit in several provisions of the Act that the Act applies only to information in existence at the time a request for information is received. See Gov't Code §§ 552.002, .021, .227, .351. A governmental body need not release information that did not exist when it received a request or create new information in response to a request. See *Economic Opportunities Dev. Corp. of San Antonio v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed). However, a governmental body that receives a request has a duty to make a good faith effort to relate the request to information that it holds or to which it has a right of access. See Open Records Decision No. 561 at 8 (1990).

(2) for a governmental body and the governmental body owns the information or has a right of access to it.

Gov't Code § 552.002; *see also* Gov't Code § 552.021.

You contend that the submitted letter is not "public information" because it was not used in the transaction of official business. However, the letter at issue was created by a university employee acting in his official capacity as an employee of the university and has been maintained by the university since the time of its creation. In addition, you state that the "draft letter clearly indicates the direction [the university] wanted to pursue with respect to its decision to commission artists to erect exhibits on campus," that the letter reflects a "decision that the University had looked to pursue," and that it "documents the deliberative process by which the University's art committee reviewed [the requestor's] proposal." Based on your statements, we find that the draft letter was used by the university in making decisions regarding the art commission at issue and thus was used in connection with the transaction of official business. *See* Gov't Code § 552.002(a). Therefore, the submitted draft letter is public information subject to release unless otherwise excepted from disclosure. *See* Gov't Code §§ 552.002, .021, .221, .301.

We turn now to the exceptions that you claim under the Act. Section 552.103 of the Government Code provides in part:

(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.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) that the information at issue is related to that litigation. *See 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 (Tex.

App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

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). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body’s receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).² Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You do not assert that litigation regarding this matter was pending at the time the university received this request. Instead, you claim that litigation was reasonably anticipated and state that the university “anticipates that [the requestor] will seek redress with respect to this proposed art commission.” You do not inform us of any particular acts on the part of the requestor that indicate he is preparing to file suit against the university. Instead, you contend that the university anticipates litigation because the requestor “‘is ‘very upset’ that the project stalled,” because the requestor contends that he has an implied contract with the university, and because the requestor makes references to his attorney and wished to have his attorney present at meetings with university officials. Having considered your arguments and representations, we find that you have failed to provide us with any “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” ORD 452 at 4. Because you have failed to establish that litigation was reasonably anticipated when the university received this request, none of the submitted information may be withheld on the basis of section 552.103.

You also assert that the submitted information may be withheld pursuant to section 552.111 of the Government Code. This section excepts from public disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” The purpose of this exception is to protect advice, opinion, and

²In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission (“EEOC”), *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

recommendation in the decisional process and to encourage open and frank discussion in the deliberative process. *See Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615 (1993), this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts only those internal communications that consist of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. *See* Open Records Decision No. 615 at 5.

A governmental body's policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; *see also City of Garland v. The Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). A governmental body's policymaking functions do include administrative and personnel matters of broad scope that affect the governmental body's policy mission. *See* Open Records Decision No. 631 at 3 (1995).

Further, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. *See* Open Records Decision No. 615 at 5. If, however, the factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information may also be withheld under section 552.111. *See* Open Records Decision No. 313 at 3 (1982).

Although you argue that the letter documents the university's policymaking process, we find that it does not consist of advice, recommendations, or opinions or otherwise reflect an internal deliberation regarding the university's policymaking processes. Therefore it may not be withheld pursuant to section 552.111. Because the exceptions that you claim do not apply and the submitted information is not otherwise confidential by law, 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).

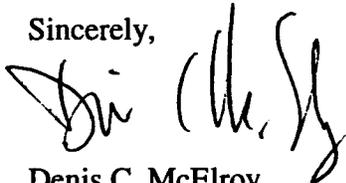
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Dep't of Pub. 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/lmt

Ref: ID# 193808

Enc. Submitted documents

c: Mr. Rolando Briseno
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(w/o enclosures)