



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 10, 2004

Mr. Dean J. Johnson
Attorney-at-Law
City of Beaumont Legal Department
P.O. Box 3827
Beaumont, Texas 77704-3827

OR2004-3811

Dear Mr. Johnson:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 200260.

The City of Beaumont (the "city") received a request for various categories of information, including e-mail correspondence between city officials and departments, information related to employment opportunities and hiring decisions within the city's police department, training records for named police officers and Internal Affairs Division files related to named police officers. You claim that the requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we must address the city's responsibilities under the Act. The majority of the information sought by the requestor is e-mail correspondence. You contend that the city's computer system is not capable of quickly searching for and retrieving the requested e-mail messages. You contend that city staff would be required to expend 2497 man hours to search 336 individual e-mail sites, which you estimate would cost the city \$114,800, in order to comply with the request for the e-mail correspondence. Section 552.222 of the Government Code permits a governmental body to ask the requestor to clarify or narrow the scope of the request. Section 552.222(b) provides:

If what information is requested is unclear to the governmental body, the governmental body may ask the requestor to clarify the request. If a large amount of information has been requested, the governmental body may discuss with the requestor how the scope of a request might be narrowed, but

the governmental body may not inquire into the purpose for which information will be used.

However, a request for records made pursuant to the Act may not be disregarded simply because a citizen does not specify the exact documents the citizen desires. Open Records Decision No. 87 (1975). Numerous opinions of this office have addressed situations in which a governmental body has received an "overbroad" written request for information. For example, Open Records Decision No. 561 at 8-9 (1990) states:

We have stated that a governmental body must make a good faith effort to relate a request to information held by it. Open Records Decision No. 87 (1975). It is nevertheless proper for a governmental body to require a requestor to identify the records sought. Open Records Decision Nos. 304 (1982); 23 (1974). For example, where governmental bodies have been presented with broad requests for information rather than specific records we have stated that the governmental body may advise the requestor of the types of information available so that he may properly narrow his request. Open Records Decision No. 31 (1974).

In this instance, you do not give any indication that the city contacted the requestor about narrowing her request under section 552.222. Although section 552.222 allows the city to ask the requestor to narrow the scope of her request, section 552.222 does not relieve the city of its obligation to timely request a decision from this office in compliance with section 552.301 or to comply with the request.

Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Upon careful review of the request for information and the information you have submitted, we determine that you have timely submitted documents, or representative samples of documents, that are responsive to two requested items. Specifically, those two items are: (1) documents identifying all applicants for CID openings since 2000; and (2) copies of every final rank list for every CID opening that has become available since January 1, 2000. On March 6, 2004, via Federal Express, you submitted information responsive to the following additional items: (1) copies of all e-mails from within the Beaumont Police department involving the availability of openings in the narcotics unit in the years 2002, 2003, and 2004, including announcements of openings and; (2) notes made by each member of the interviewing committee, regardless of when the notes were made, regarding positions in Special Crimes that became available in calendar year 2003. You did not submit to this office copies or samples of the information responsive to the remaining items listed in the

request. You state that you received the request for information on February 9, 2004. As such, pursuant to section 552.301(e), you were required to submit all responsive information or samples thereof to this office by March 2, 2004. Therefore, you failed to comply with the requirements of section 552.301(e) in regard to the information you failed to submit and to the information submitted via Federal Express on March 6, 2004.

With regard to the information never submitted to this office and the information that was not timely submitted, we point out that, pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Generally, a governmental body may demonstrate a compelling reason to withhold information by a showing that the information is made confidential by another source of law or affects third party interests. *See Open Records Decision No. 630* (1994). Section 552.103 of the Government Code is a discretionary exception to disclosure that protects the governmental body's interests and may be waived by the governmental body. Thus, section 552.103 is not a compelling reason to withhold the information not timely submitted to this office from the public. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.— Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally).

You also claim the information you have not submitted to this office is excepted from disclosure under section 552.101. However, because you have not submitted it, we have no basis for finding it confidential. Thus, we have no choice but to order the information released pursuant to section 552.302. If you believe any of the information not submitted to this office is confidential and may not be lawfully released, you must challenge the ruling in court as outlined below.

However, because section 552.101 can demonstrate a compelling reason to withhold information, we will consider its applicability to the information submitted on March 6, 2004. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes. Specifically, you raise section 2000e-5 of Title 42 of the United States Code, which provides, in part:

Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the [Equal Employment Opportunity] Commission [(the "EEOC")], alleging that an employer . . . has engaged in an unlawful employment practice, the [EEOC] shall serve a notice of the

charge . . . and shall make an investigation thereof. . . . Charges shall not be made public by the [EEOC]. . . . Nothing said or done during and as a part of such informal endeavors may be made public by the [EEOC].

42 U.S.C. § 2000e-5(b). We have previously held that “[this] federal statute only restricts disclosure by those enforcing the Equal Employment Opportunity Act.” See Open Records Decision Nos. 245 (1980), 155 (1977), 59 (1974); *Whitaker v. Carney*, 778 F2d 216 (1985), *cert denied*, 479 U.S. 813 (1986) (title VII proscribes release of information only when held by EEOC or EEOC employees not when held by employer). No federal statute or regulation prevents an employer’s disclosure of information relating to a claim of employment discrimination. See Open Records Decision Nos. 132 (1976). Therefore, in the hands of the city, the information submitted to this office on March 6, 2004 is not made confidential by federal law.

We will now consider the applicability of section 552.103 to the information you have submitted to this office as required by section 552.301(e). Section 552.103 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 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).

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 is reasonably anticipated where the prospective opposing party has filed a complaint with the Equal Employment Opportunity Commission ("EEOC"). See Open Records Decision No. 336 (1982). In this instance, you advise and provide documentation showing that on December 29, 2003, the city received a notice of charge of discrimination from the EEOC. The charge of discrimination reflects that the requestor is the person filing the charge. You further inform us that the requestor's EEOC charge was pending on the date of the city's receipt of this request for information. You also state that the submitted information relates to the charges filed with the EEOC by the requestor. Based on these representations, we find that the city reasonably anticipated litigation on the date of its receipt of this request for information. We also find that the submitted information relates to the anticipated litigation. We therefore conclude that the city may withhold the following information at this time under section 552.103: (1) documents identifying all applicants for CID openings since 2000; and (2) copies of every final rank list for every CID opening that has become available since January 1, 2000.¹

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 anticipated 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 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

¹Because section 552.103 is dispositive, we need not address your other claimed exception at this time.

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,

A handwritten signature in black ink, appearing to read "Cary Grace", with a long horizontal line extending to the right.

Cary Grace
Assistant Attorney General
Open Records Division

ECG/krl

Ref: ID 200260

Enc. Submitted documents

c: Ms. Tina Lewallen
1215 Longview
Beaumont, Texas 77706
(w/o enclosures)