



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 23, 2007

Ms. Christy Drake-Adams  
Bovey, Akers & Bojorquez, L.L.P.  
For City of Troy  
12325 Hymeadow Drive, Suite 2-100  
Austin, Texas 78750

OR2007-00756

Dear Ms. Drake-Adams:

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# 269660.

The City of Troy (the "city"), which you represent, received a request for the requestor's client's personnel file. You state that some of the requested information has been released to the requestor. You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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.

Gov't Code § 552.103(a), (c). The governmental body 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. *Univ. of Tex. Law Sch. v. Tex. 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 governmental body must meet both prongs of this test for information to be excepted under section 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). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* 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). 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 explain that the city is a “party to an ongoing appeal of an F-5 Report of Separation of Licensee which may ultimately be referred to the State Office of Administrative Hearings as a contested case” under section 1701.4525 of the Occupations Code. You further indicate that the requestor, an attorney for the licensee, has threatened to file legal proceedings against the city “for injunctive relief and . . . damages” on behalf of his client. Based upon your representations, our review of the submitted information, and the totality of the circumstances, we conclude that the city reasonably anticipated litigation on the date that it received this request for information. We also find that the submitted information relates to the anticipated litigation.

We note, 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 all of the parties in the pending litigation is not excepted from

disclosure under section 552.103(a). Here, the opposing party in the anticipated litigation, has seen or had access to most of the documents at issue. Accordingly, to the extent that the submitted information has been obtained from or provided to the opposing party, it is not excepted from disclosure under section 552.103(a). However, to the extent that the submitted information has not been obtained from or provided to the opposing party, it may be withheld from disclosure under section 552.103(a). We note, however, that the applicability of section 552.103(a) ends once the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). We now address the remaining information that is not excepted from disclosure under section 552.103 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses federal statutes. The submitted information contains an I-9 form (Employment Eligibility Verification), which is governed by section 1324a of Title 8 of the United States Code. This section provides that an I-9 form and “any information contained in or appended to such form, may not be used for purposes other than for enforcement of this chapter” and for enforcement of other federal statutes governing crime and criminal investigations. *See* 8 U.S.C. § 1324a(b)(5); *see also* 8 C.F.R. § 274a.2(b)(4). Release of the form in this instance would be “for purposes other than for enforcement” of the referenced federal statutes. Accordingly, we conclude that the I-9 form is confidential and may only be released in compliance with the federal laws and regulations governing the employment verification system.

The remaining submitted information includes a W-4 form of the requestor’s client, which is also excepted from disclosure under section 552.101. Title 26 section 6103(a) of the United States Code renders tax return information confidential. This term has been interpreted by federal courts to include any information gathered by the Internal Revenue Service regarding a taxpayer’s liability under title 26 of the United States Code. *Mallas v. Kolak*, 721 F. Supp 748 (M.D.N.C. 1989). Section 6103(c), however, is an exception to the confidentiality provisions of section 6103(a). Section 6103(c) provides that, unless the Secretary of Treasury determines that disclosure would seriously impair tax administration, tax record information may be released to any person or persons as the taxpayer may designate in a consent to such disclosure.. *See* 26 U.S.C. § 6103(c); *see also Lake v. Rubin*, 162 F.3d 113 (D.C. Cir. 1998) (26 U.S.C. § 6103 represents exclusive statutory route for taxpayer to gain access to own return information and overrides individual’s right of access under 5 U.S.C. § 552a(d)(1) to federal agency records concerning self). To the extent the requestor’s client has consented to the disclosure of his tax record information to his attorney, you must release the W-4 form to the requestor. Otherwise, this form is confidential under section 6103 of title 26 of the United States Code and must be withheld under section 552.101 of the Government Code.

Next, we note that the remaining documents contain information that may be excepted from disclosure pursuant to section 552.1175 of the Government Code, which provides in part:

(a) This section applies only to:

(1) peace officers as defined by Article 2.12, Code of Criminal Procedure[.]

(b) Information that relates to the home address, home telephone number, or social security number of an individual to whom this section applies, or that reveals whether the individual has family members is confidential and may not be disclosed to the public under this chapter if the individual to whom the information relates:

(1) chooses to restrict public access to the information; and

(2) notifies the governmental body of the individual's choice on a form provided by the governmental body, accompanied by evidence of the individual's status.

*Id.* § 552.1175(a)(1), (b). We have marked the personal information of an individual who may be a licensed peace officer with another city's police department. To the extent this individual is a licensed peace officer who elects to restrict access to the information in accordance with section 552.1175(b), the personal information we have marked must be withheld under section 552.1175.

In summary, to the extent the submitted information has not been obtained from or provided to the opposing party, it may be withheld from disclosure under section 552.103(a) of the Government Code. The city must withhold the submitted I-9 form under section 552.101 of the Government Code in conjunction with federal law. To the extent the requestor's client has consented to the disclosure of his tax record information to his attorney, the city must release the W-4 form to the requestor; otherwise, the city must withhold the submitted W-4 form under section 552.101 of the Government Code in conjunction with section 6103. The city must withhold the personal information we have marked under section 552.1175 of the Government Code if the individual to whom it pertains is a licensed peace officer who elects to restrict access to the information in accordance with section 552.1175(b). The remaining

information must be released to the requestor.<sup>1</sup> As our ruling is dispositive, we need not address your remaining arguments against disclosure.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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

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<sup>1</sup>We note that the documents being released contain the requestor's client's personal and Texas motor vehicle record information that would otherwise be confidential under sections 552.117 and 552.130 of the Government Code. As the authorized representative of the individual whose information is at issue, the requestor has a right of access to his client's information under section 552.023 of the Government Code. See Gov't Code § 552.023(a). We note that the city must again seek a decision from this office if it receives another request for this particular information from a different requestor.

complaints about over-charging must be directed to Hadassah Schloss at the Office of the Attorney General 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,



Jaime L. Flores  
Assistant Attorney General  
Open Records Division

JLF/jww

Ref: ID# 269660

Enc. Submitted documents

c: Mr. Wayne Bachus  
Bachus, Wilkerson, & Associates  
2014 Bird Creek Terrace  
Temple, Texas 76502  
(w/o enclosures)