



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 17, 2007

Ms. Zandra L. Pulis
Senior Counsel
Legal Services Division
City Public Service Board
P.O. Box 1771
San Antonio, Texas 78296

OR2007-10627

Dear Ms. Pulis:

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# 287698.

The City Public Service Board of the City of San Antonio ("CPS") received two requests from the same requestor for 20 categories of information relating to the requestor; certain other CPS employees, consultants, and vendors; and other matters. You claim that the requested information is excepted from disclosure under sections 552.103, 552.117, 552.130, 552.133, and 552.147 of the Government Code.¹ We have considered the exceptions you claim and have reviewed the information you submitted.²

We first note that some of the submitted information falls within the scope of section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[.]" unless the information is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. Gov't Code § 552.022(a)(1). Section 552.022(a)(2) requires disclosure of "the name, sex, ethnicity,

¹You concede that CPS did not raise section 552.130 within its ten-business-day deadline under section 552.301 of the Government Code. See Gov't Code §§ 552.301(b), .302. Nevertheless, because section 552.130 is a mandatory exception that may not be waived, we will consider your claim under this exception. See *id.* §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

²This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes CPS to withhold any information that is substantially different from the submitted information. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

salary, title, and dates of employment of each employee and officer of a governmental body[,]" unless the information is expressly confidential under other law. *Id.* § 552.022(a)(2). Section 552.022(a)(3) requires disclosure of "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[,]" unless the information is expressly confidential under other law. *Id.* § 552.022(a)(3). In this instance, the submitted documents include completed evaluations that are subject to section 552.022(a)(1). The documents at issue also contain salary information that is encompassed by section 552.022(a)(2) and information in vouchers and contracts that is subject to section 552.022(a)(3). Although you seek to withhold the information in question under section 552.103 of the Government Code, that section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive Gov't Code § 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, CPS may not withhold any of the submitted information that is subject to section 552.022 under section 552.103.

You also seek to withhold the information that is encompassed by section 552.022 under section 552.133 of the Government Code. Section 552.133(d) provides that "[t]he requirement of Section 552.022 that a category of information listed under Section 552.022(a) is public information and not excepted from required disclosure under this chapter unless expressly confidential under other law does not apply to information that is excepted from required disclosure under [section 552.133]." Gov't Code § 552.133(d). You also raise sections 552.117 and 552.130 of the Government Code, which are confidentiality provisions for the purposes of section 552.022. Accordingly, we will consider your claims under sections 552.133, 552.117, and 552.130 with respect to the information that is subject to section 552.022. We also will address your claim under section 552.103 with respect to the remaining information.

Section 552.133 excepts from disclosure information held by a public power utility that is related to a competitive matter. *See id.* § 552.133(b). "Competitive matter" is defined as a matter that the public power utility governing body in good faith determines by vote to be related to the utility's competitive activity. *Id.* § 552.133(a)(3). The governing body also must determine, in like manner, that the release of the information would give an advantage to competitors or prospective competitors. *Id.* Section 552.133(a)(3) lists thirteen categories of information that may not be deemed to be competitive matters. The attorney general may conclude that section 552.133 is inapplicable to the information at issue only if, based on the information provided, the attorney general determines that the public power utility governing body has not acted in good faith in determining that the issue, matter, or activity is a competitive matter or that the information requested is not reasonably related to a competitive matter. *Id.* § 552.133(c). Furthermore, section 552.133(b) provides as follows:

Information or records are excepted from [required public disclosure] if the information or records are reasonably related to a competitive matter, as

defined in this section. Excepted information or records include the text of any resolution of the public power utility governing body determining which issues, activities, or matters constitute competitive matters. Information or records of a municipally owned utility that are reasonably related to a competitive matter are not subject to disclosure under this chapter, whether or not, under the *Utilities Code*, the municipally owned utility has adopted customer choice or serves in a multiply certificated service area. This section does not limit the right of a public power utility governing body to withhold from disclosure information deemed to be within the scope of any other exception provided for in this chapter, subject to the provisions of this chapter.

Id. § 552.133(b). You inform us that CPS is a public power utility for the purposes of section 552.133. We understand you to contend that all of the information that is subject to section 552.022 is reasonably related to a competitive matter and, if released, would give a competitor or prospective competitor an unfair advantage.

You have provided a copy of a resolution adopted by CPS's board of trustees (the "board") that delineates categories of information that have been determined to be competitive matters for purposes of section 552.133. You contend that the information that is subject to section 552.022 falls within the scope of specified provisions of the resolution. Having reviewed those provisions of the resolution and considered your arguments, we find that the resolution encompasses some of the information at issue. We also find that the information at issue is not clearly among the types of information that section 552.133(a)(3) expressly excludes from the definition of a competitive matter. Moreover, based on the information that you have provided, we cannot conclude that CPS has failed to act in good faith. *See id.* § 552.133(c). We therefore conclude that CPS must withhold the information that we have marked under section 552.133. We also find, however, that you have not sufficiently demonstrated that the remaining information that is subject to section 552.022 is reasonably related to a competitive matter, as defined by the resolution. We therefore conclude that the board may not withhold any of the remaining information that is subject to section 552.022 on the basis of section 552.133.

We note, however, that section 552.117 may be applicable to some of that information. Section 552.117(a)(1) *excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024 of the Government Code.* Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See Open Records Decision No. 530 at 5 (1989).* Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request under section 552.024 that

the information be kept confidential. We have marked social security numbers and other information that CPS must withhold under section 552.117(a)(1), to the extent that the employees to whom the marked information pertains timely requested confidentiality for that information under section 552.024.³

With respect to the information that is not subject to section 552.022, we address your claim under section 552.103. That exception 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 that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. 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.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

You state, and have provided documentation reflecting, that the requestor filed a claim of discrimination with the Equal Employment Opportunity Commission (the "EEOC") prior to the date of CPS's receipt of these requests for information. You contend that the information that is not subject to section 552.022 is related to the requestor's discrimination claim. This office has stated that a pending EEOC complaint indicates that litigation is reasonably anticipated. *See Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).* We therefore

³To the extent that the marked social security numbers are not excepted from disclosure under section 552.117, we note that section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

find, based on your representations and the submitted documentation, that CPS reasonably anticipated litigation on the date of its receipt of these requests. We also find that the information that is not subject to section 552.022 is related to the anticipated litigation. We therefore conclude that CPS may withhold that information, which we have marked, under section 552.103.

In reaching this conclusion, we assume that the opposing party in the anticipated litigation has neither seen nor had access to any of the information in question. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that is related to litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). If the opposing party has seen or had access to information that is related to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We note that the applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary: (1) CPS must withhold the information that we have marked under section 552.133 of the Government Code; (2) CPS must withhold the information that we have marked under section 552.117(a)(1) of the Government Code to the extent that the employees to whom the marked information pertains timely requested confidentiality for that information under section 552.024 of the Government Code; and (3) CPS may withhold the submitted information that is not subject to section 552.022 of the Government Code under section 552.103 of the Government Code. The rest of the submitted information must be released.⁴

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).

⁴As we are able to make these determinations, we need not address your claim under section 552.130 of the Government Code.

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 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,

A handwritten signature in black ink, appearing to read 'J.W. Morris III', with a large, stylized flourish at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/ma

Ref: ID# 287698

Enc: Submitted documents

c: Ms. Sandra Higginbotham
1273 Common Street
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(w/o enclosures)