



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 2, 2008

Ms. Jan M. Foster  
Lower Colorado River Authority  
P.O. Box 220  
Austin, Texas 78767-0220

OR2008-00030

Dear Ms. Foster:

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# 298318.

The Lower Colorado River Authority (the "LCRA") received a request for seven categories of information related to current and former employees of the LCRA, including the requestor. You state that the LCRA does not assert an exception to Exhibit F. You claim that the remaining information is excepted from disclosure under sections 552.103, 552.107, 552.111, 552.117, and 552.1175 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information, portions of which include representative samples of information.<sup>1</sup>

Initially, we note that a portion of the submitted information is not responsive to the instant request for information because it was created after the date of the request. The LCRA need not release non-responsive information in response to this request and this ruling will not address that information. We have marked the non-responsive information contained in Exhibit J.

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<sup>1</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Next, we note that the submitted information includes documents that are subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part:

(a) the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108; [and]

(2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body[.]

Gov't Code § 552.022(a)(1), (2). The submitted information contains completed evaluations and a completed report made for or by the LCRA, which are expressly public under section 552.022(a)(1), and salary information pertaining to LCRA employees which is expressly public under section 552.022(a)(2). Although you claim that the information at issue is excepted from disclosure under section 552.103 of the Government Code, we note that this exception to disclosure is a discretionary exception under the Act that does not constitute "other law" for purposes of section 552.022.<sup>2</sup> Thus, the LCRA may not withhold the information subject to section 552.022, which we have marked, under section 552.103 of the Government Code. As you raise no further exceptions against the disclosure of this information, it must be released.

You raise section 552.103 for the remaining information in Exhibits B, C, D, E, G, H, I, and J. Section 552.103 provides in relevant part 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.

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<sup>2</sup>Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or which implicates the interests of third parties. See *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 section 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

(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 to show that the section 552.103 exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date that the governmental body received the request for information, 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103.

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. *See 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.<sup>3</sup> *See* Open Records Decision No. 555 (1990); *see also* 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. *See* Open Records Decision No. 361 (1983).

In this instance, you inform us that the requestor is a former employee of the LCRA. You state, and provide documentation showing, that the requestor is represented by an attorney and has filed charges of discrimination and retaliation on behalf of the requestor against the LCRA with the Texas Workforce Commission Civil Rights Division and the Equal Employment Opportunity Commission. We note that the charges were filed after the date of the request. However, you also state that the requestor’s attorney threatened litigation on

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<sup>3</sup>In 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, *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).

August 16, 2007 when he notified the LCRA that the requestor authorized him to initiate litigation within ten days. Based upon your representations and our review, we conclude that the LCRA reasonably anticipated litigation on the date that it received this request for information. Furthermore, upon review of the information at issue and your representations, we find that the information relates to the anticipated litigation. Accordingly, we conclude that section 552.103 is generally applicable to the information not subject to section 552.022 in Exhibits B, C, D, E, G, H, I, and J and it may be withheld on that basis.<sup>4</sup>

The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). Thus, when the opposing party has seen or had access to information relating to anticipated litigation, there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We further 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). Upon review, we note that the requestor has already had access to a portion of the e-mails contained in Exhibits G and H. Thus, the opposing party to the litigation has already had access to this information. Accordingly, the LCRA may not withhold these documents, which we have marked, under section 552.103 of the Government Code.

We note that Exhibit F contains information subject to section 552.117(a)(1). Section 552.117(a)(1) exempts from public 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. Accordingly, to the extent that the information we have marked belongs to current or former employees of the LCRA, and the employees timely elected confidentiality for this information under section 552.024, the LCRA must withhold this information under section 552.117(a)(1). The LCRA may not withhold this information under section 552.117(a)(1) if the employees did not make timely elections to keep the information confidential.

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<sup>4</sup>As our ruling is dispositive, we need not address your remaining arguments against the disclosure of this information.

Section 552.1175 of the Government Code provides in part the following:

(b) Information that relates to the home address, home telephone number, or social security number of [a peace officer as defined by article 2.12 of the Code of Criminal Procedure], 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.

Gov't Code § 552.1175(b). The submitted documents contain information pertaining to officers who do not work for the LCRA. If these individuals are currently licensed peace officers who elect to restrict access to this information in accordance with section 552.1175(b), the LCRA must withhold the information, which we have marked, under section 552.1175.

We also note that Exhibit F contains information subject to section 552.137 of the Government Code.<sup>5</sup> Section 552.137 makes certain e-mail addresses confidential, providing the following:

- (a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.
- (c) Subsection (a) does not apply to an e-mail address:
  - (1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

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<sup>5</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Gov't Code § 552.137. Under section 552.137, a governmental body must withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs has affirmatively consented to its public disclosure. *See id.* § 552.137(b). We note that section 552.137 does not apply to a government employee's work e-mail address because such an address is not that of the employee as a "member of the public" but is instead the address of the individual as a government employee. The e-mail addresses we have marked are not of a type specifically excluded by section 552.137(c) of the Government Code. Therefore, the LCRA must withhold the marked e-mail addresses in accordance with section 552.137 unless the LCRA receives consent for their release.

To conclude, the LCRA must release the information we have marked that is subject to section 552.022(a)(1) and section 552.022(a)(2). Except for the e-mails which we have marked for release in Exhibits G and H, the information in Exhibits B, C, D, E, G, H, I, and J may be withheld under section 552.103. The LCRA must withhold the information we have marked in Exhibit F under section 552.117(a)(1) if it belongs to a current or former employee of the LCRA and the employee timely elected confidentiality for their information. The LCRA must withhold the information we have marked under section 552.1175 if the officers at issue are currently licensed peace officers who elect to restrict access to their personal information in accordance with section 552.1175(b). The e-mail addresses we have marked must be withheld under section 552.137 unless the LCRA receives consent for their release. The remaining information 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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,



Jordan Johnson  
Assistant Attorney General  
Open Records Division

JJ/mcf

Ref: ID# 298318

Enc. Submitted documents

c: Mr. Jeff Morales  
c/o Ms. Jan M. Foster  
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(w/o enclosures)