



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 14, 2008

Mr. David B. Casas
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR2008-04914

Dear Mr. Casas:

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# 307132.

The City of San Antonio (the "city") received two requests from the same requestor for the performance appraisals for several named Airport Police personnel, and for several categories of information regarding the Airport Police. You state you have released some information to the requestor. You also state that you have no information responsive to portions of the request.¹ You claim that the remaining requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.² We have also received and considered comments submitted by the requestor. *See Gov't Code* § 552.304 (interested party may submit comments stating why information should or should not be released).

¹The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990).

²We 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.

Initially, we note that some of the submitted information, which we have marked, is not responsive to the instant requests because it was created after the city received the requests. This ruling does not address the public availability of information that is not responsive to the requests, and city need not release such information in response to these requests.

Next, we note that some of the submitted information is subject to required public disclosure under 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[.]

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1)(2), (3). Some of the submitted information is expressly public under subsections 552.022(a)(1), (a)(2), and (a)(3). Section 552.103 of the Government Code is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See* Gov't Code § 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 (discretionary exceptions). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the city may not withhold any of the information that is subject to section 552.022 under section 552.103. As you raise no further exceptions against the disclosure of the information subject to section 552.022, this information must be released to the requestor.

With respect to the submitted information that is not subject to section 552.022, we address your claim under section 552.103 of the Government Code, which provides in part the following:

(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 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 on the date 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(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* This office has stated that a pending Equal Employment Opportunity Commission ("EEOC") complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You inform us, and have provided documentation demonstrating, that the requestor, a former city employee filed a claim of discrimination with the EEOC prior to the city's receipt of these requests. You also state that the information at issue is related to this discrimination claim. Based on your arguments and the submitted documentation, we find that the city reasonably anticipated litigation on the date it received these requests. We also find that the information at issue is related to the anticipated litigation. Therefore, the city may withhold the information at issue pursuant to section 552.103 of the Government Code.

In reaching this conclusion, we assume that the opposing party in the anticipated litigation has not seen or 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 anticipated 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 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).

In summary, information subject to section 552.022 of the Government Code must be released to the requestor. The city may withhold the remaining responsive information pursuant to section 552.103 of the Government Code.

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).

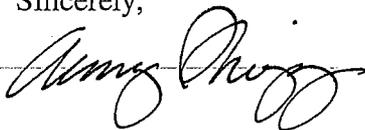
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,



Amy L.S. Shipp
Assistant Attorney General
Open Records Division

ALS/jb

Ref: ID# 307132

Enc. Submitted documents

c: Ms. Kim Igleheart
17065 Cibolo Bend
Marion, Texas 78124
(w/o enclosures)