



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 3, 2008

Mr. Michael F. Miller
Senior Assistant City Attorney
City of Galveston
P.O. Box 779
Galveston, Texas 77553-0779

OR2008-07541

Dear Mr. Miller:

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# 312034.

The City of Galveston (the "city") received a request for four categories of information related to the police lieutenant's assessment center. You claim that the 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 information.

We begin by noting that two of the submitted documents are not responsive to the instant request for information, as they were created after the date that the city received the request. You have marked one of these documents and we have marked the other. This ruling does not address the public availability of any information that is not responsive to the request, and the city need not release that information in response to this request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that did not exist at time request was received).

Section 552.103 of the Government Code 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 raises section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. 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).

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). 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.¹ 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).

For the purposes of section 552.103(a), litigation includes civil lawsuits and criminal prosecutions, as well as proceedings that are governed by the Administrative Procedure Act (the “APA”), chapter 2001 of the Government Code, or are otherwise conducted in a quasi-

¹In 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).

judicial forum. *See* Open Records Decision Nos. 588 (1991), 474 (1987), 368 (1983), 336 (1982). You inform us that on the same date that the city received the instant request for information, the requestor appealed the city's assessment process used to promote police officers to lieutenant. Information about the assessment process is the subject of the request.

You explain that appeals of certain employee grievances are subject to arbitration pursuant to a collective bargaining agreement (the "agreement") between the city and the Galveston Municipal Police Association under The Fire and Police Employee Relations Act, chapter 174 of the Local Government Code. *See* Local Gov't Code § 174.001 *et seq.* You also state that the arbitration is governed by the Labor Rules of the American Arbitration Association (the "AAA"). We note that under Article 7 of the agreement, an arbitration of a grievance is binding. We also note that under the AAA's Labor Rules, the parties may be represented by counsel, witnesses may be required to testify under oath, an arbitrator authorized by law to subpoena witnesses and documents may do so, and the arbitrator is the judge of the relevance and materiality of the evidence. Thus, you assert that the appeal process constitutes litigation of a judicial or quasi-judicial nature for purposes of section 552.103. *See generally* Open Records Decision No. 301 (1982) (discussing meaning of "litigation" under predecessor to section 552.103). However, you also state that Article 24, section II(C) of the agreement provides that "[t]he results of the Assessment Center testing and scores shall NOT be subject [to the] appeals process." Thus, you assert that litigation is pending because the appeal process results in arbitration. However, you also assert that the appeal was wrongfully taken and therefore, pursuant to the agreement, no arbitration, and thus no litigation for purposes of section 552.103, is available in this situation. Because you have submitted conflicting arguments pertaining to the effect of the appeal that had been filed at the time of the receipt of the request, we conclude that you have failed to demonstrate that actual litigation was pending on the date the request was received.

Further, you have not explained how the requestor's appeal could result in litigation of a judicial or quasi-judicial nature for purposes of section 552.103, nor have you informed us that on the date the city received the request for information the requestor had actually threatened litigation or otherwise taken any concrete steps toward the initiation of litigation. *See generally* Open Records Decision No. 301 (1982) (discussing meaning of "litigation" under predecessor to section 552.103). Therefore, we find that you have not established that the city reasonably anticipated litigation on the date that it received the request for information. *See* ORD 331. Accordingly, the city may not withhold any of the submitted information under section 552.103 of the Government Code and it must be released to the requestor.

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).

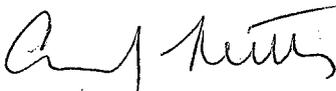
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records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



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/mcf

Ref: ID# 312034

Enc. Submitted documents

c: Mr. Thomas P. Karlok
396 Ling Street
Hitchcock, Texas 77562
(w/o enclosures)