



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 26, 2008

Mr. Donald R. Stout
Colvin & Stout
P.O. Box 597
Ennis, Texas 75120

OR2008-11800

Dear Mr. Stout:

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# 320237.

The City of Midlothian (the "city"), which you represent, received five requests for the draft of and response to a memorandum regarding a city councilman, as well as information related to traffic violations at a specific intersection. You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received comments from the attorney representing the councilman. *See Gov't Code § 552.304* (interested party may submit comments stating why information should or should not be released).

Initially, we note that you have not submitted any information responsive to the portion of the request that asks for information related to traffic offenses at a specific intersection. Therefore, we assume that the city has released this information to the extent it existed at the time of the request. If not, it must do so at this time. *See Gov't Code §§ 552.006, .301, .302; 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).

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) Without limiting the amount or kind of information that is public information under this chapter, 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[.]

Gov't Code § 552.022(a)(1). A portion of the submitted information constitutes a completed report made by or for the city. A completed report must be released under section 552.022(a)(1) unless the information is excepted from disclosure under section 552.108 or expressly confidential under other law. We have marked the completed report that is subject to section 552.022. You claim that portions of the submitted information are excepted from disclosure under sections 552.103 and 552.111 of the Government Code. However, these sections are discretionary exceptions under the Act and do not constitute "other law" for purposes of section 552.022. *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); *see also* Open Records Decision Nos. 473 (1987) (governmental body may waive section 552.111), 665 at 2 n.5 (2000) (discretionary exceptions generally). Accordingly, the city may not withhold the information subject to section 552.022 under sections 552.103 or 552.111 of the Government Code. However, we will address your claim under section 552.103 in regard to the remaining submitted information that is not subject to section 552.022.

Section 552.103 of the Government Code provides in 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.

...

(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.

Id. § 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 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). The 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 "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. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). 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). 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).

You assert that release of the submitted information would certainly and immediately trigger a lawsuit. You state that the attorney representing the city councilman at issue has told the city council that he intends to file a lawsuit against the city if the draft report is released to the public. Based on your representations and the submitted documentation, we find that the city reasonably anticipated litigation on the date of its receipt of this request. We also find that the submitted information is related to the anticipated litigation.

We note, however, that the opposing party in the anticipated litigation has seen or had access to the remaining information. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Thus, if the opposing party has seen or had access to information relating 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 therefore conclude that the city may not withhold the remaining information under section 552.103 of the Government Code.

Section 552.117 of the Government Code excepts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request

that this information be kept confidential under section 552.024.¹ Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Thus, the city must withhold the information we have marked under 552.117 if the employee at issue elected to keep such information confidential prior to the receipt of this request. If the employee at issue did not elect to keep such personal information confidential, the information must be released, along with the remaining information. Therefore, the city may only withhold information under section 552.117 on behalf of current or former employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made.

We also note that the submitted information contains an e-mail address that is excepted from disclosure under section 552.137 of the Government Code, which requires a governmental body to 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* Gov't Code § 552.137(b). You do not inform us that the owner has affirmatively consented to release the e-mail address we have marked. Therefore, unless the city receives consent, the city must withhold the e-mail address we have marked under section 552.137.

In summary, the city must withhold the information we have marked under (1) section 552.117 if the employee at issue elected to keep such information confidential prior to the receipt of this request; and (2) section 552.137 of the Government Code unless the city receives consent for the e-mail address at issue. 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). If the governmental body does not file suit over 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).

¹ The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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,



Chris Schulz
Assistant Attorney General
Open Records Division

CS/mcf

Ref: ID# 320237

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