



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 10, 2008

Ms. Holly C. Lytle
Assistant County Attorney
El Paso County, Texas
500 East San Antonio, Room 503
El Paso, Texas 79901

OR2008-12498

Dear Ms. Lytle:

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# 321351.

The El Paso County Attorney's Office (the "county") received a request for eight categories of information related to they county's settlement of a specific case. You state that you are releasing most of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code, and rule 192.5 of the Texas Rules of Civil Procedure.¹ We have considered your arguments and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we note that some of the responsive information is the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2008-10843 (2008). To the extent the law, facts, and circumstances on which the prior ruling was based have not changed, the county may continue to rely on that ruling as a previous determination and withhold the requested information in accordance with Open Records Letter No. 2008-10843. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and

¹ Although the county raises section 552.101 of the Government Code in conjunction with rule 192.5 of the Texas Rules of Civil Procedure, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990).

circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the submitted responsive information is not identical, we will consider the submitted arguments.

Section 552.103, the litigation exception, 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.

...

(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). The county has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in this particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date that the request for information is received, 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 county must meet both prongs of this test for information to be excepted under section 552.103(a). You argue the information at issue relates to pending litigation.

You state, and submitted documentation demonstrating, that the county filed in County Court at Law Number 5 in El Paso County, Texas, a Petition to Take Deposition Before Suit pursuant to Texas Rule of Civil Procedure 202. You state this action is still pending. You state that a hearing was held on May 9, 2008, and the judge granted the motion for continuance of the hearing on the merits of the petition and ordered the county to provide the requestor with certain documents related to this action. You submitted a copy of the hearing transcript as well as an unsigned copy of the written order. You argue that “[t]o allow the requestor to obtain more [information] than the judge’s order directs would contradict and make worthless the judge’s order.”

We find that, in this case, the Rule 202 action constitutes litigation for the purposes of section 552.103. While a court has held that Rule 202 does not authorize discovery before suit is filed other than for taking of deposition, *see In re Azko Nobel Chemical, Inc.*, 24 S.W.3d 919 (Tex. App.—Beaumont 2000), the judge in the Rule 202 matter here nevertheless has issued orders concerning the release of information related to the Rule 202 action after hearing arguments on the motion for continuance. Further, after review of the information at issue, we find that it is related to the pending Rule 202 matter. Therefore, based on your arguments and our review of the submitted information, we conclude that the county may withhold the remaining submitted information under section 552.103 of the Government Code.² *See* Open Records Decision No. 551 at 3 (1990) (“We do not believe the [Public Information] Act was intended to provide parties involved in litigation any earlier or greater access to information than was already available directly in such litigation.”)

We note, however, that once information has been obtained by all parties to the pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the pending litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends when the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

In summary, to the extent that the information at issue was previously ruled upon in Open Records Letter No. 2008-10843, you may continue to withhold that information pursuant to that ruling. The county may withhold the remaining information under section 552.103.

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).

² As our ruling is dispositive, we need not address your remaining argument against disclosure of this information.

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# 321351

Enc. Submitted documents

c: Mr. John P. Mobbs
4157 Rio Bravo
El Paso, Texas 79902
(w/o enclosures)