



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 28, 2009

Ms. Barbara L. Quirk  
Bovey & Bojorquez, L.L.P.  
12325 Hymeadow Drive, Suite 2-100  
Austin, Texas 78750

OR2009-05616

Dear Ms. Quirk:

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# 341140.

The City of Nolanville (the "city"), which you represent, received a request for information pertaining to the city's population. You state you have released some responsive information to the requestor. 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.<sup>1</sup>

You claim all of the requested information is subject to section 552.103 of the Government Code, which 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

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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.

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 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* Open Records Decision No. 551 at 4-5 (1990). 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 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. *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *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.*); ORD 551 at 4. A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated for purposes of section 552.103, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *See* 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"). 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 inform us that the submitted information is related to a population count conducted by the city. You assert that an attorney representing the City of Harker Heights ("Harker Heights") has contacted the city regarding a disagreement over this population count. You further assert that possible litigation was discussed in a meeting of the Harker Heights Council. However, you do not inform us that the city is a party to any pending litigation. Furthermore, you do not indicate, nor does the information reflect, that the requestor has taken any objective steps towards initiating litigation against the city. *See* Open Records

Decision No. 361 (1983). Therefore, we find the city has not demonstrated that litigation was pending or reasonably anticipated on the date it received the instant request for information. Accordingly, the city may not withhold any portion of the submitted responsive information under section 552.103 of the Government Code.

We note that some of the requested information may be subject to sections 552.117 and 552.137 of the Government Code.<sup>2</sup> Section 552.117(a)(1) excepts from disclosure the 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 of the Government Code. *See* Gov't Code §§ 552.117(a)(1), .024. Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). The city may only withhold information under section 552.117(a)(1) on behalf of former or current officials who have made a request for confidentiality under section 552.024 prior to the date on which the request for information was made. In this instance, we have marked the information within the submitted documents that is generally subject to section 552.117. We note that section 552.117 also encompasses a personal cellular telephone number, provided that the cellular telephone service is not paid for by a governmental body. *See* Open Records Decision No. 506 at 5-6 (1988). You do not inform this office that the city official whose information we have marked elected to keep his home address and home telephone number confidential before the city received the instant request for information or that this individual pays for his own cellular telephone service. Thus, to the extent this official timely elected to withhold his home address and home telephone number under section 552.024, and he pays for his own cellular telephone service, the city must withhold the information we marked under section 552.117(a)(1). If this official did not timely elect confidentiality, the marked information may not be withheld under section 552.117(a)(1). If the city pays for the cellular service pertaining to the telephone number we marked, this information may not be withheld under section 552.117(a)(1).

Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). Gov't Code § 552.137(a)-(c). We have marked e-mail addresses which do not appear to be of a type specifically excluded by section 552.137(c). Therefore, the city must withhold the marked e-mail addresses pursuant to section 552.137 of the Government Code, unless the city has received consent for their release.

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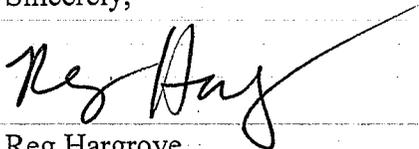
<sup>2</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

In summary, to the extent the official at issue timely elected confidentiality under section 552.024 of the Government Code, and to the extent this individual at issue pays for his own cellular telephone service, the city must withhold the information we marked under section 552.117(a)(1). To the extent the city has not received consent for their release, the city must also withhold the e-mail addresses we marked under section 552.137 of the Government Code. The remaining information must be released.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Reg Hargrove  
Assistant Attorney General  
Open-Records Division

RJH/eeg

Ref: ID# 341140

Enc. Submitted documents

c: Requestor  
(w/o enclosures)