



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 14, 2009

Ms. Amy L. Sims
Assistant City Attorney
City of Lubbock
P.O. Box 2000
Lubbock, Texas 79457

OR2009-14549

Dear Ms. Sims:

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# 358275.

The City of Lubbock (the "city") received a request for 1) the employee handbooks for the city and city cemetery, including a code of ethics, 2) a specified cemetery file 3) the city cemetery's policy on disinterment, and 4) any court order required for disinterment during a specified time period. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code.¹ We have considered the exception you claim and reviewed the submitted information.

Initially, we note that you have not submitted the requested employee handbooks or city policy for our review. We also note you have submitted only one court order. Thus, to the extent any additional responsive information existed when the present request was received, we assume it has been released. If such information has not been released, then it must be released at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

¹Although the city also raises sections 552.101, 552.107, and 552.111 of the Government Code, it makes no arguments to support these exceptions. *See* Gov't Code § 552.301(e)(1)(A). Therefore, we do not address sections 552.101, 552.107, and 552.111.

We next note that portions of the submitted information are subject to section 552.022 of the Government Code, which provides in relevant part:

[T]he following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

...

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

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(3), (17). Accordingly, the city may withhold the information we have marked under sections 552.022(a)(3) and 552.022(a)(17) only if such information is "expressly confidential under other law." Although you seek to withhold this information under section 552.103 of the Government Code, section 552.103 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *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); Open Records Decision Nos. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not "other law" that makes information expressly confidential for the purposes of section 552.022. Therefore, the marked documents that are subject to sections 552.022(a)(3) and 552.022(a)(17) may not be withheld under section 552.103. As you claim no other exceptions to disclosure, the information we have marked under sections 552.022(a)(2) and 552.022(a)(17) must be released.

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).*

You state, and the submitted documents reflect, that prior to the city's receipt of the current request for information, a lawsuit was filed against the city in the 72nd District Court of Lubbock County, Texas. Based on your representation and our review, we find that you have demonstrated that litigation was pending when the city received this request for information. We also conclude that the remaining information is related to the pending litigation for the purposes of section 552.103.

We note, however, that the opposing party in the pending litigation has seen or had access to some of the information at issue. 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).* Therefore, to the extent that the opposing party in the pending litigation has seen or had access to any portion of the information not subject to section 552.022, such information is not protected by section 552.103 and may not be withheld on that basis. With the exception of such information, the city may withhold the information not subject to section 552.022 at this time under section 552.103 of the Government Code. We 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, the city must release the information we have marked under sections 552.022(a)(3) and 552.022(a)(17) of the Government Code. With the exception of

information the opposing party has seen, the city may withhold the remaining information under section 552.103 of the Government Code.

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, 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, toll free, at (888) 672-6787.

Sincerely,



Tamara Wilcox
Assistant Attorney General
Open Records Division

TW/dls

Ref: ID# 358275

Enc. Submitted documents

c: Requestor
(w/o enclosures)