



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 29, 2010

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

OR2010-01392

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# 369139.

The City of Lubbock (the "city") received a request for the most recent administrative review for a named employee and any communications informing the named employee that he was being placed on leave. You claim the requested information is excepted from disclosure under section 552.103 of the Government Code.<sup>1</sup> We have considered the exception you claim and reviewed the submitted information.

Initially, we note some of the submitted information is subject to section 552.022(a)(1) of the Government Code, which provides:

the following categories of information are public information and not excepted from required disclosure under [the Act] unless they are expressly confidential under other law:

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<sup>1</sup>Although you initially raised sections 552.101, 552.102, 552.111, and 552.117 of the Government Code, you have not submitted arguments explaining how these exceptions apply to the submitted information. Therefore, we presume that you have withdrawn these exceptions. *See* Gov't Code §§ 552.301, 552.302.

(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). The submitted information contains a completed evaluation, which must be released under section 552.022(a)(1), unless the information is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law.<sup>2</sup> Section 552.103 of the Government Code is a discretionary exception to public disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; *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 No. 665 at 2 n.5 (discretionary exceptions generally). As such, section 552.103 is not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the city may not withhold the completed evaluation under section 552.103 of the Government Code. As you raise no further exceptions to disclosure of this information, the completed evaluation must be released to the requestor.

We next address your claim under section 552.103 of the Government Code for the information not subject to section 552.022. Section 552.103 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.

Gov't Code § 552.103(a), (c). The city 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, 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*

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<sup>2</sup>We note the city did not claim section 552.108 as an exception to disclosure of the information at issue.

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). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See id.*

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). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See id.* This office has found that a pending Equal Employment Opportunity Commission complaint and a pending complaint filed with the Texas Workforce Commission’s Civil Rights Division (the “TWC”) indicate litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You state, and provide documentation showing, that the employee named in the request filed a retaliation claim with the TWC prior to the city’s receipt of this request. You also state that the information at issue is related to this discrimination claim. Based on your arguments, and the submitted information, we find that the city reasonably anticipated litigation on the date of its receipt of this request. We also find that the information at issue is related to the anticipated litigation. Therefore, we find that section 552.103 is generally applicable to the information at issue.

We note, however, that once the opposing party in the pending litigation has seen or had access to information that is related 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). Thus, the information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. In this instance, the opposing party to the anticipated litigation has already had access to the information at issue. Therefore, none of the submitted information may be withheld under section 552.103.

We note some of the submitted information is excepted from disclosure under section 552.101 of the Government Code.<sup>3</sup> Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information that contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and is not of legitimate concern to the public. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976). The type of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information

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<sup>3</sup>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).

relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. In addition, this office has found that some kinds of medical information or information indicating disabilities or specific illnesses is protected by common-law privacy. *See* Open Records Decision Nos. 470 (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps). Upon review, we find some of the submitted information is highly intimate or embarrassing and of no legitimate public interest. Therefore, the city must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. The remaining information must be released to the requestor.

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

Sincerely,



Amy L.S. Shipp  
Assistant Attorney General  
Open Records Division

ALS/rl

Ref: ID# 369139

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)