



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

February 11, 2010

Ms. Paige A. Saenz
Knight & Partners
223 West Anderson Lane, Suite A-105
Austin, Texas 78752

OR2010-02148

Dear Ms. Saenz:

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# 369961.

The City of Bartlett (the "city"), which you represent, received a request for the following categories of information pertaining to the requestor's overtime: (1) identification of each day and/or time period that is being disputed; (2) a copy of each time sheet showing the disputed time with the disputed time period marked; and (3) a copy of the overtime justification sheets that accompanied the disputed time sheets. You claim that the 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.¹

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.

¹We 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.

...

(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).*

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.² *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)*. Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. *Open Records Decision No. 361 (1983)*. For the purposes of section 552.103(a), litigation includes civil lawsuits and criminal prosecutions, as well as proceedings that are governed by the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code, or are otherwise conducted in a quasi-judicial forum. *See Open Records Decision Nos. 588 (1991), 474 (1987), 368 (1983), 336 (1982)*.

²In 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)*.

You state that, prior to the date of the request for information, the city received a letter from the requestor proposing a settlement of the requestor's claim regarding her overtime pay. The letter, dated July 30, 2009, states that the "Wage and Hour Board" has asked that the requestor attempt to settle her claims with the city. You argue that because the overtime claim has not been settled and that the requestor has contacted the "Wage and Hour Board," the city reasonably anticipated litigation at the time of the request. However, you do not explain how the settlement process or contact with the "Wage and Hour Board" constitutes litigation of a judicial or quasi-judicial nature for purposes of section 552.103. *See* Open Records Decision No. 301 (1982) (discussing meaning of "litigation" under predecessor to section 552.103). Further, you have not informed us that on the date the city received the request for information the requestor had actually threatened litigation or otherwise taken any concrete steps toward the initiation of litigation. *See generally* ORD 301. Therefore, we find you have not established that the city reasonably anticipated litigation on the date it received the request for information. *See* ORD 331. Accordingly, the city may not withhold any of the submitted information under section 552.103 of the Government Code. As you raise no further exceptions, the submitted information must be released to the requestor.³

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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/dls

³We note that the information being released contains confidential information to which the requestor has a right of access. *See* Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual or authorized representative asks governmental body to provide information concerning that individual). However, if the city receives another request for this particular information from a different requestor, then the city should again seek a decision from this office.

Ref: ID# 369961

Enc. Submitted documents

c: Requestor
(w/o enclosures)