



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 21, 2010

Ms. Jason D. King
Attorney for City of Bee Caves
Akers & Boulware-Wells, LLP
6618 Sitio Del Rio Boulevard Building E Suite 102
Austin, Texas 78730

OR2010-07328

Dear Mr. King:

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# 380225.

The City of Bee Caves (the "city"), which you represent, received a request for 12 categories of information relating to (1) a specified case in the city's Municipal Court No. 1; (2) a list of traffic citations; (3) court hearings in which charitable donations were discussed; (4) documents that justify the termination of a former city court clerk's employment; (5) the former clerk's and a named municipal judge's personnel and employment files; (6) a named individual's contract with the city; (7) communications with the named individual relating to the city's municipal courts; (8) charitable donations to the city during the named judge's tenure; (9) reports of court costs assessed and received during the judge's term of office; and (10) communications between or among the judge, two other named city officials, and members of the city council pertaining to the former clerk. You claim that the requested information is exempted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the

representative samples of information you submitted.¹ We assume that the city has released any other types of information that are responsive to this request, to the extent that such information existed when the city received the request. If not, then any such information must be released immediately.² See Gov't Code §§ 552.221, .301, .302; Open Records Decision No. 664 (2000).

We note that some of the submitted information was created subsequent to the date of the city's receipt of this request for information. The Act does not require a governmental body to release information that did not exist when it received a request or create responsive information.³ Thus, the information we have marked that did not exist when the city received this request is not responsive to the request. This decision does not address the public availability of that information, which need not be released in response to this request.

We also find that some of the submitted information falls within the scope of section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless the information is expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). In this instance, the information submitted as Exhibit C includes completed evaluations made of, for, or by the city. That information, which we have marked, is subject to disclosure under section 552.022(a)(1). Section 552.022(a)(3) provides for required disclosure of "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body," unless the information is expressly confidential under other law. *Id.* § 552.022(a)(3). Exhibit C also includes information in contracts, accounts, and vouchers relating to the receipt or expenditure of public or other funds by the city. That information, which we have marked, is subject to disclosure under section 552.022(a)(3). Section 552.022(a)(15) provides for required disclosure of "information regarded as open to the public under an agency's policies[.]" unless the information is expressly confidential under other law. *Id.* § 552.022(a)(15). Exhibit C also includes job descriptions. Because job descriptions are available on the city's website, we find that the submitted job descriptions are regarded as open to the public under the city's

¹This letter ruling assumes that the submitted representative samples of information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the city to withhold any information that is substantially different from the submitted information. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

²We note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

³See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

policies and are therefore subject to section 552.022(a)(15). Although you seek to withhold the information in Exhibit C under section 552.103 of the Government Code, that section is a discretionary exception to 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 Gov't Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). As such, section 552.103 is not other law that makes information expressly confidential for the purposes of section 552.022(a)(1) (3), or (5). Therefore, the marked information that is subject to section 552.022(a)(1), (3), and (15) may not be withheld under section 552.103.

We note that section 552.136 of the Government Code is applicable to some of the information that is subject to section 552.022(a)(3).⁴ Section 552.136, which is a confidentiality provision for the purposes of section 552.022(a)(3), provides that “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). We have marked bank account and bank routing numbers that the city must withhold under section 552.136.⁵ The rest of the marked information that is subject to section 552.022(a)(1), (3), and (15) must be released.

Next, we address your claim under section 552.103 for the information in Exhibit B and the remaining information in Exhibit C. This exception 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

⁴This office will raise section 552.136 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov't Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

⁵We note that this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including a bank account number and a bank routing number under section 552.136, without the necessity of requesting an attorney general decision.

anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Id. § 552.103(a), (c). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. 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).*

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See Open Records Decision No. 452 at 4 (1986).* To demonstrate that litigation is reasonably anticipated, a governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and more than mere conjecture. *Id.* 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.⁶ *See Open Records Decision No. 555 (1990); see also 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 contend that the remaining information at issue is related to a grievance initiated by a former city employee under chapter 554 of the Government Code, the Whistleblower Act. Section 554.006 of the Government Code provides in part that an aggrieved party must initiate action under the grievance or appeal procedures of the employing state or local governmental entity before filing suit. *See Gov't Code § 554.006(a).* You state that the former employee has properly initiated the city's grievance procedures. Based on your representations and our review of the remaining information, we find that you have demonstrated that the information at issue is related to litigation that the city reasonably anticipated when it received this request for information. We therefore conclude that

⁶In 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).*

section 552.103 is generally applicable to Exhibit B and the remaining information in Exhibit C.

We note, however, that the remaining information includes the former employee's application for employment by the city. 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. If the opposing party has seen or had access to information relating to anticipated 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, the former employee's employment application, which we have marked, may not be withheld under section 552.103 and must be released. Although the former employee also has seen or had access to other information in Exhibit C, she only saw or had access to that information in the usual scope of her employment. Such information is not considered to have been obtained by the opposing party to anticipated litigation and thus may be withheld under section 552.103. Therefore, with the exception of the employment application, the city may withhold Exhibit B and the remaining information in Exhibit C under section 552.103.⁷ We note that the applicability of this exception 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: (1) the city must withhold the marked bank account and bank routing numbers under section 552.136 of the Government Code; (2) the city must release the rest of the marked information that is subject to section 552.022(a)(1), (3), and (15) of the Government Code; and (3) except for the marked employment application, which must be released, the city may withhold the rest of the responsive information under section 552.103 of the Government Code.⁸

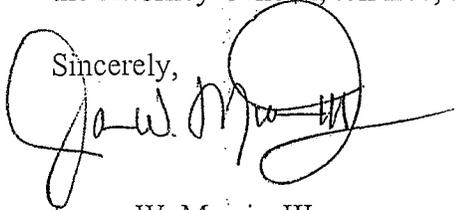
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

⁷As we are able to make this determination, we need not address the city's claim for Exhibit B under section 552.107(1) of the Government Code.

⁸We note that the city would ordinarily be required to withhold some of the information that must be released pursuant to exceptions that protect personal privacy. In this instance, however, the requestor has a right to the private information as an attorney for the former employee whose privacy interests are implicated. *See* Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning herself). Should the city receive another request for these same records from a person who would not have a right of access to the former employee's private information, the city should resubmit these records and request another decision. *See* Gov't Code §§ 552.301(a), .302.

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,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is written in a cursive style with a large, circular flourish at the end.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/rl

Ref: ID# 380225

Enc: Submitted documents

c: Requestor
(w/o enclosures)