



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 30, 2010

Ms. Laura Garza Jimenez  
Nueces County Attorney  
901 Leopard Street, Room 207  
Corpus Christi, Texas 78401-3680

OR2010-11505

Dear Ms. Jimenez:

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# 388524.

The Nueces County Judge (the "county") received a request for the following information pertaining to the requestor's client, a named former county employee: 1) personnel file; 2) payroll and benefits file; 3) e-mails and electronic communications regarding the employee; 4) documents evidencing complaints, disciplinary actions, and counseling sessions with the employee and any supervisory district attorney personnel, including interoffice memorandum, notes, letters, or other documentation memorializing such events; and 5) all documentation the district attorney's office relied on in support of its termination of the employee. You assert the county has no information responsive to items 3 through 5 of the request. You claim the submitted personnel records are excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

We note some of the submitted records were the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2010-10774 (2010). In that ruling, we determined that, to the extent the employee whose information was at issue timely elected confidentiality under section 552.024, the county must withhold the employee's personal information under section 552.117(a)(1) of the Government Code, but must release the remaining records. Accordingly, we presume that the county complied with that ruling and released the remaining records. In response to the current request, you seek, in part, to withhold under section 552.103 the personnel records that should have been released in accordance with Open Records Letter No. 2010-10774. We note the Act does

not permit selective disclosure of information to the public. *See* Gov't Code §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). Information that has been voluntarily released to a member of the public may not subsequently be withheld from another member of the public, unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988). Although you seek to withhold the requested information 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 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 neither expressly prohibits the release of information to the public nor makes information confidential under law. Therefore, to the extent this office ordered the release of the submitted records in Open Records Letter No. 2010-10774, the county may not now withhold any such information from the present requestor under section 552.103.

We further note the information which was withheld under section 552.117(a)(1) in Open Records Letter No. 2010-10774 is the personal information of the present requestor's client. Pursuant to section 552.023 of the Government Code, a person or a person's authorized representative has a special right of access, beyond the right of the general public, to information held by a governmental body that relates to the person and that is protected from public disclosure by laws intended to protect that person's privacy interests. Gov't Code § 552.023(b). Therefore, this information may not be withheld from the present requestor on the basis of section 552.117(a)(1). *See* Open Records Decision No. 673 (2001) (stating if law, facts, and circumstances have changed since issuance of prior ruling, that ruling may no longer be used as previous determination).

To the extent the submitted records were not the subject of Open Records Letter No. 2010-10774, we will address your argument under section 552.103 of the Government Code. Section 552.103 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 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 has the burden of providing relevant facts and documents to show that the section 552.103 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. *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.); Open Records Decision No. 551 at 4 (1990). The governmental body must meet both prongs of this test for information to be excepted under section 552.103.

To establish 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. 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. 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). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. ORD 452 at 4.

You state the county anticipates a wrongful termination lawsuit from the named employee. You assert the county reasonably anticipates this litigation because an attorney representing the employee made a public statement that he "plans to seek all damages and benefits [for his client] under employment law." Based on your representations and our review, we agree the county reasonably anticipated litigation on the date the instant request was received. You also state the personnel records relate to the anticipated litigation because they contain information concerning complaints and disciplinary actions against the employee as well as benefits information that relates to potential damages. Based on your representations and our review, we find the personnel records relate to the anticipated litigation for purposes of section 552.103.

We note, however, most of the personnel records are forms completed by the employee, who is the opposing party in the anticipated litigation. 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). Accordingly, the county may not withhold the personnel forms completed by the employee under section 552.103. As you raise no further exceptions to disclosure of this information,

it must be released. The remaining information consists of pay stubs. It is unclear based on our review whether the employee has seen or had access to these pay stubs. Accordingly, to the extent the employee has seen or had access to the pay stubs, such information is not protected by section 552.103 and must be released. To the extent the employee has not seen or had access to the pay stubs, this information may be withheld under section 552.103.<sup>1</sup>

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,



Jessica Eales  
Assistant Attorney General  
Open Records Division

JCE/em

Ref: ID# 388524

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

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<sup>1</sup>We note that the applicability of section 552.103 ends once the related litigation concludes. See Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).