



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 5, 2010

Ms. Janet M. Spugnardi  
Assistant City Attorney  
Messer, Campbell & Brady  
6351 Preston Road, Suite 350  
Frisco, Texas 75034

OR2010-15136

Dear Ms. Spugnardi:

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# 395799.

The City of Murphy (the "city"), which you represent, received three requests from the same requestor for the following: (1) all credit card receipts for two specified trips taken by a named employee, (2) the named employee's performance reviews for 2009 and 2010, and (3) the personnel files of the named employee and another named employee.<sup>1</sup> You state the city does not have any credit card receipts regarding one of the trips specified in the request or the named individual's performance review for 2010.<sup>2</sup> You claim the submitted information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.117,

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<sup>1</sup>You inform us, and provide documentation showing, the city sought and received clarification regarding the first request. See Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); see also *City of Dallas v. Abbott*, 304 S.W. 3d 380, 387 (Tex. 2010) (holding that when governmental entity, acting in good faith, requests clarification or narrowing of unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

<sup>2</sup>The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. 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), 563 at 8 (1990), 555 at 1-2 (1990).

552.136, 552.137, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the submitted information is made expressly public under section 552.022 of the Government Code, which provides, in relevant part, as follows:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

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

...

(15) information regarded as open to the public under an agency's policies[.]

Gov't Code § 552.022(a)(1), (3), (15). The submitted information includes completed evaluations that are subject to section 552.022(a)(1) and contracts and a voucher relating to the receipt or expenditure of public funds that are subject to section 552.022(a)(3). Further, we note Exhibit 10 contains job descriptions, which are usually open to the public as part of a job posting. If the city regards these job descriptions, which we have marked in Exhibit 10, as open to the public, then this information is subject to section 552.022(a)(15). Although the city seeks to withhold the information subject to section 552.022 under section 552.103 of the Government Code, this section is a discretionary exception and, as such, is not other law for purposes of section 552.022. *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); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 473 (1987) (governmental body may waive section 552.103). Therefore, the evaluations we have marked as subject to section 552.022(a)(1) and the contracts and voucher we have marked subject to section 552.022(a)(3) may not be withheld under section 552.103. Additionally, pursuant to section 552.022(a)(15), the job descriptions we have marked in Exhibit 10 may not be withheld under section 552.103 if they are regarded by the city as open to the public. We

will, however, address the city's argument under section 552.103 for the information not subject to section 552.022. Additionally, because information subject to section 552.022 may be withheld under section 552.136 of the Government Code, we will address the city's argument under this exception for a portion of the information subject to section 552.022. We will also consider your remaining arguments against disclosure of the information not subject to section 552.022.

Next, we address your argument under section 552.103 of the Government Code for the information not subject to section 552.022. Section 552.103 provides in relevant 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). The governmental body 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 that the city 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(a).

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. *Id.* In Open Records Decision No. 638 (1996), this office stated that a governmental body has met its burden of showing that litigation is reasonably anticipated when it received a notice of claim letter and the governmental body represents that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act ("TTCA"), Civ. Prac. & Rem. Code, ch. 101, or an applicable municipal ordinance. If a governmental body does not make this

representation, the claim letter is a factor that this office will consider in determining whether a governmental body has established that litigation is reasonably anticipated based on the totality of the circumstances.

You state that, prior to receiving the instant request, the city received a notice of claim letter from the requestor's attorney concerning the termination of the requestor's employment with the city. You do not affirmatively represent to this office that the notice of claim letter complies with the TTCA or an applicable ordinance; therefore, we will only consider the letter as a factor in determining whether the city reasonably anticipated litigation over the incident in question. Additionally, you inform us that the city has been involved in unsuccessful settlement negotiations regarding the requestor's termination. Upon review of your arguments, the submitted information, and the totality of the circumstances, we determine the city has established it reasonably anticipated litigation on the date it received the request for information. We also conclude the submitted information not subject to section 552.022 relates to the anticipated litigation for purposes of section 552.103. Accordingly, we agree the city may withhold the submitted information not subject to section 552.022 pursuant to section 552.103 of the Government Code.<sup>3</sup>

We note that 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, to the extent that the opposing party in the anticipated litigation has seen or had access to any portion of the information at issue, such information is not protected by section 552.103 and may not be withheld on that basis. 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).

Next, we address your assertion that a portion of the information subject to section 552.022 of the Government Code, in Exhibit 5B, is excepted from disclosure under section 552.136. Section 552.136 of the Government Code states that "[n]otwithstanding any other provision of this chapter, 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). Upon review, we find you have failed to explain how any of the information at issue in Exhibit 5B constitutes a credit card, debit card, charge card, or access device number. Accordingly, the city may not withhold any of the information at issue under section 552.136 of the Government Code.

In summary, the city must release the evaluations we have marked as subject to section 552.022(a)(1) of the Government Code and the contracts and voucher we have marked as subject to section 552.022(a)(3) of the Government Code. The submitted job descriptions, which we have marked in Exhibit 10, also must be released pursuant to

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<sup>3</sup>As our ruling on this issue is dispositive, we do not address your remaining arguments against disclosure of this information.

section 552.022(a)(15) of the Government Code if the city regards this information as open to the public. The city may withhold the remaining submitted 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](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/tp

Ref: ID# 395799

Enc. Submitted documents

c: Requestor  
(w/o enclosures)