



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

February 8, 2011

Ms. Anne M. Constantine
Legal Counsel
Dallas/Fort Worth International Airport
P.O. Box 619428
DFW Airport, Texas 75261-9428

OR2011-01926

Dear Ms. Constantine:

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# 408416.

The Dallas Fort Worth International Airport Board (the "board") received a request for information from a named individual's personnel file, not including information previously released to the requestor.¹ You claim the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments submitted by the requestor's attorney. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we address the assertion of the requestor's attorney the board waived its claim under section 552.103 of the Government Code. The requestor's attorney states the information sought by the requestor is related to a previous request for information, in response to which this office issued Open Records Letter No. 2009-09775 (2009). In that ruling, the board claimed the information at issue was excepted under section 552.101 of the Government Code. The board claims information responsive to the instant request is excepted from

¹We note in a letter dated December 28, 2010, the requestor's attorney informed this office the requestor does not seek any information that has previously been released to the requestor.

disclosure under section 552.103. The requestor asserts the board should have consistently objected to the requests under section 552.103 and the board should not be allowed to assert section 552.103 now because it "did not plead that exception in response to the [previous] request." We note section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests and may be waived by the governmental body. *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 section 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). Thus, the board has the discretion to release information that could be potentially withheld under section 552.103, even if it seeks to withhold other responsive information under the same exception. We note section 552.007 of the Government Code prohibits an agency from selectively disclosing information that is not confidential by law but that an agency may withhold under an exception to disclosure. Gov't Code § 552.007. Therefore, if an agency releases nonconfidential information to a member of the public, then the agency must release the exact same information to all members of the public who request it. However, section 552.007 does not prohibit an agency from withholding similar types of information. Because the requestor specifically does not seek any information previously released, we will address the board's arguments.

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.

...

(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.

Id. § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) that the information at issue is related to that 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).

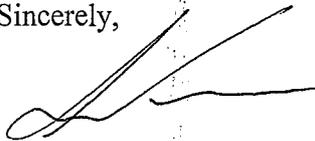
You inform us, and provide documentation showing, the board was named as a defendant in a lawsuit styled *Di Ann Sanchez v. Dallas/Fort Worth International Airport Board*, Civil Action No. 4:09-CV-373-A, which was filed in the United States District Court for the Northern District of Texas, Fort Worth Division. You further state, and the documentation reflects, the lawsuit was filed prior to the board's receipt of the present request for information. Upon review, we conclude litigation was pending when the board received the request. Our review of the submitted information also shows it is related to the pending litigation for purposes of section 552.103. Accordingly, we find the board may withhold the submitted information under section 552.103.

We note, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing parties in the pending litigation is not excepted from disclosure under section 552.103(a), and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

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,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eeg

Ref: ID# 408416

Enc. Submitted documents

c: Requestor
(w/o enclosures)