



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 21, 2011

Mr. Gary Henrichson
Assistant City Attorney
City of McAllen
P. O. Box 220
McAllen, Texas 78505-0220

OR2011-13610

Dear Mr. Henrichson:

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# 429049 (McAllen PIR W005129-062211).

The City of McAllen (the "city") received a request for the "statistical information/meta data" pertaining to a specified affidavit. 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 information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we address the requestor's contention that the city failed to comply with section 552.301(e) in requesting a decision from this office. Section 552.301 describes the procedural obligations placed on a governmental body that receives a written request for information it wishes to withhold. Pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving an open records request: (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e)(1)(A)-(D). The city states, and the request for information reflects, the city received the request for information on June 22, 2011.

July 4, 2011, was a federal holiday. We note this office does not count the date the request was received or holidays for the purpose of calculating a governmental body's deadlines under the Act. Thus, the city's fifteen business-day deadline was July 14, 2011. The envelope in which the city submitted the brief at issue is postmarked July 13, 2011. *See id.* § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Consequently, we find the city complied with the requirements of section 552.301(e) in requesting this decision from our office.

Next, the requestor asserts the city has previously released the submitted information. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential by law. *See id.* § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). We understand the requestor to contend that, because the affidavit to which the submitted information pertains has been released to him and introduced in a public hearing, then the submitted information is consequently in "the public realm." However, we note section 552.007 applies only to the exact information released to the public and does not prohibit a governmental body from withholding similar or related information. Thus, release of the affidavit to which the submitted information pertains does not constitute release of the submitted information itself. The requestor also argues that the testimony of certain city employees in an open hearing about the date the affidavit was created, modified, and completed "placed the information [the requestor] seeks in the public realm." Thus, we understand the requestor to contend that the testimony of the city employees consisted of the submitted information and, thus, the submitted information was released. However, the requestor does not state the exact information at issue was released to a member of the public. Further, the city states that, while the affidavit itself was produced to the requestor, "[a]t no time was any metadata produced along with the affidavit" and that the submitted information "has never been produced to, or otherwise obtained by, the requestor or anyone representing the requestor." Whether the testimony of the city employees constitutes the exact information submitted is a question of fact. This office is unable to resolve disputes of fact in the open records ruling process. Accordingly, we must rely upon the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernable from the documents submitted for our inspection. *See* Open Record Decision No. 522 at 4 (1990). Accordingly, we find section 552.007 is inapplicable to the submitted information and we will address the city's argument against its disclosure.

Section 552.103 of the Government Code provides 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(a) 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 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You inform us the requestor has been indefinitely suspended from the city's police department. You state the city is a civil service city under chapter 143 of the Local Government Code. You also state the requestor has filed an appeal to his suspension pursuant to chapter 143 of the Local Government Code. We note municipal civil service appeals, such as the one at issue here, are governed by chapter 143 of the Local Government Code. *See* Local Gov't Code §§ 143.057, .127-.131. This office has determined such appeal proceedings constitute litigation for purposes of section 552.103. *Cf.* Open Records Decision No. 588 (1991). You state the appeal proceeding was ongoing on the date the city received the instant request for information. Based on your representations and our review of the submitted documents, we find the city was a party to pending litigation on the date it received the request for information. Further, you state the submitted information relates to the issue in the pending appeal. Upon review, we find the submitted information is related to the pending litigation. Accordingly, we conclude section 552.103 of the Government Code is applicable to the submitted information.

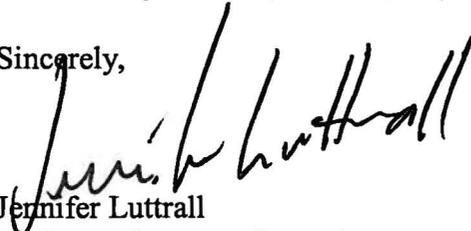
We note once the information at issue has been obtained by all parties to the pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Accordingly, the city may only withhold the submitted information that the opposing party to the litigation has not seen or accessed under section 552.103 of the Government Code. We note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney

General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). Therefore, the city may withhold the 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, 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

Ref: ID# 429049

Enc. Submitted documents

c: Requestor
(w/o enclosures)