



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 3, 2011

Mr. Jason D. King
Akers & Boulware-Wells, L.L.P.
6618 Sitio Del Rio Boulevard, Building E, Suite 102
Austin, Texas 78730

OR2011-16205

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# 435142.

The City of Balch Springs (the "city"), which you represent, received two requests from the same requestor for information relating to accusations of malfeasance or misappropriation of funds against his client, a copy of the Equal Employment Opportunity Commission ("EEOC") Agreement between the city and his client, a copy of the city charter, a copy of his client's personnel file, information pertaining to a meeting held in April 2011 regarding his client, correspondence sent to department heads from the city manager's office requesting preliminary or final budget numbers, a copy of any preliminary or final budget transmitted to the city manager by his client, and all correspondence sent to his client by a named individual. You claim 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 representative sample of information.¹

Initially, we address your statement that some of the requested information is available on the city's website. We note section 552.228 of the Government Code requires a governmental body to provide a requestor with a "suitable copy" of requested public

¹This letter ruling assumes the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. See Gov't Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

information. Gov't Code § 552.228(a). We also note “[a] public information officer does not fulfill his or her duty under the Act by simply referring a requestor to a governmental body’s website for requested public information.” Open Records Decision No. 682 at 7 (2005). Instead, section 552.221 of the Government Code requires a governmental body “to either provide the information for inspection or duplication in its offices or to send copies of the information by first class United States mail.” *Id.*; see Gov’t Code § 552.221(b). Thus, the city must provide access to or copies of the responsive information you state is on the city’s website to the requestor; however, we note a requestor may agree to accept information on a governmental body’s website in fulfillment of a request for information under the Act. See ORD 682 at 7.

Next, we note portions of the submitted information are subject to section 552.022 of the Government Code, which provides in relevant part:

(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:

...

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

...

(18) a settlement agreement to which a governmental body is a party.

Gov’t Code § 552.022(a)(3), (18). The submitted information contains a cash receipt relating to the receipt of funds by the city subject to section 552.022(a)(3). The submitted information also contains a settlement agreement between the city and the requestor’s client that is subject to section 552.022(a)(18). Although you raise section 552.103 of the Government Code for this information, this section is a discretionary exception to disclosure that protects a governmental body’s interest 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 section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body’s position in litigation and does not itself make information confidential). Consequently, the city may not withhold the submitted cash receipt or the settlement agreement, which we have marked, under section 552.103 of the Government Code. As you raise no other exception to disclosure, this information must be released. However, we will address your claim under section 552.103 for the remaining information.

Section 552.103 of the Government Code provides in part the following:

(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 city has the burden of providing relevant facts and documents to show 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 of the receipt of the request for information and (2) the information at issue is related to the pending or anticipated 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 city must meet both prongs of this test for information to be excepted under section 552.103(a).

You state, and provide documentation representing, that prior to your receipt of the instant request, a lawsuit styled *Charla Harris v. City of Balch Springs*, Cause No. DC-11-09780-J, was filed by the requestor, and is currently pending in the 191st District Court of Dallas County, Texas. Based on this representation and our review, we agree litigation to which the city is a party was pending on the date the city received the present request. You also state the remaining information relates to the pending litigation because it concerns the job performance and termination of the requestor's client. Based on this representation and our review, we find the remaining information is related to the pending litigation. Accordingly, section 552.103 is generally applicable to the remaining information.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) of the Government Code interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, any information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a). However, information accessed by the opposing party only in the usual scope of her employment with the city is not considered to have been obtained by the opposing party to the anticipated litigation and may, thus, be withheld under section 552.103. In this instance, some of the information at issue has been seen by the opposing party to the anticipated litigation outside her usual scope of employment. This information, which we have marked for release, may not be withheld under section 552.103. *Id.* Accordingly, with the exception of the information we have marked for release, the city may withhold the remaining

information under section 552.103. We note the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the city must release the submitted cash receipt, which we have marked, pursuant to section 552.022(a)(3) of the Government Code and the settlement agreement pursuant to section 552.022(a)(18) of the Government Code.² With the exception of the information we have marked for release, the city may withhold the remaining 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,



Kirsten Brew
Assistant Attorney General
Open Records Division

KB/em

Ref: ID# 435142

Enc. Submitted documents

c: Requestor
(w/o enclosures)

²We note you have redacted the social security number of the requestor's client. Section 552.147(b) of the Government Code authorizes a governmental body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act. *See* Gov't Code § 552.147. However, as his client's authorized representative, the requestor has a right of access to this information and it may not be withheld from him. *See* Gov't Code § 552.023.