



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 14, 2011

Ms. Evelyn W. Njuguna  
Assistant City Attorney  
City of Houston  
P.O. Box 368  
Houston, Texas 77001-0368

OR2011-18405

Dear Ms. Njuguna:

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# 439317 (GC No. 19019).

The City of Houston (the "city") received requests for the following information: (1) copies of all applications, resumes, and Texas Department of State Health Services ("DSHS") licenses for four specified positions, as well as the 201 forms pertaining to the successful candidates for those positions; (2) the city charter civil service amendment; (3) chapter 14 of the code of ordinances; and (4) DSHS license status for registered code enforcement officers. 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 representative sample of information.<sup>1</sup>

Initially, you inform us that the Human Resources Department (the "department") "is not the custodian of records for a portion of the requested information."<sup>2</sup> It is not clear from your

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<sup>1</sup>We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

<sup>2</sup>We note your brief does not specify what information is at issue in the department's statement.

statement whether you are informing us that the *city* does not maintain the information at issue, or merely whether the *department*, as opposed to some other part of the city, does not maintain it. We note that the Act does not require the city to answer factual questions, conduct legal research, or create responsive information. Likewise, the Act does not require a governmental body to take affirmative steps to create or obtain information that is not in its possession, so long as no other individual or entity holds the information on behalf of the governmental body that receives the request. *See id.* § 552.002(a); Open Records Decision Nos. 534 at 2-3 (1989), 518 at 3 (1989). However, a governmental body must make a good-faith effort to relate a request to any responsive information that is within its possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). Moreover, administrative inconvenience in responding to a request for information under the Act is not grounds for refusing to comply with the request. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976).

Here, the request at issue was received by the city and was not expressly limited to department records. The fact that the requested information might be maintained by a different department or division within the city than the one that received the request does not mean that the request may be dismissed. *Cf.* Attorney General Opinion JM-266 at 3 (1984) (fact that a request for public records might be more appropriately directed to a different governmental body does not mean that it can be dismissed by a governmental body to which it is properly directed). Thus, since you have not provided any information responsive to a portion of the request for review, the city must release such information at this time to the extent such information existed and was maintained by the city on the date the city received the request. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, you state portions of the responsive information are the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2011-16440 (2011). As we have no indication that the law, facts, or circumstances on which the prior ruling was based have changed, we conclude the city must continue to rely on this ruling as a previous determination and withhold or release any previously ruled upon information in accordance with the prior ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, we will consider your argument for the submitted information not subject to the prior ruling.

We note the remaining information includes a city ordinance. As laws and ordinances are binding on members of the public, they are matters of public record and may not be withheld from disclosure under the Act. *See* Open Records Decision Nos. 551 at 2-3 (1990) (laws or ordinances are open records), 221 at 1 (1979) (official records of governmental body's public

proceedings are among most open of records). Therefore, the submitted city ordinance, which we have marked, must be released.

You raise section 552.103 of the Government Code for the remaining submitted information. Section 552.103 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.

Gov't Code § 552.103(a), (c). A governmental body that claims section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated 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).*

This office has long held that for purposes of section 552.103, "litigation" includes "contested cases" conducted in a quasi-judicial forum. *See Open Records Decision Nos. 474 (1987), 368 (1983), 336 (1982), 301 (1982).* Likewise, "contested cases" conducted under the Texas Administrative Procedure Act, chapter 2001 of the Government Code, constitute "litigation" for purposes of section 552.103. *See Open Records Decision Nos. 588 (1991) (concerning former State Board of Insurance proceeding), 301 (1982) (concerning hearing before Public Utilities Commission).* In determining whether an administrative proceeding is conducted in a quasi-judicial forum, this office has focused on the following factors: (1) whether the dispute is, for all practical purposes, litigated in an administrative proceeding where (a) discovery takes place, (b) evidence is heard, (c) factual questions are resolved, and (d) a record is made; and (2) whether the proceeding is an adjudicative forum of first jurisdiction, *i.e.*, whether judicial review of the proceeding in district court is an appellate

review and not the forum for resolving a controversy on the basis of evidence. *See* ORD 588.

You argue the remaining submitted information, which pertains to the claimant's appeal with the city, relates to litigation of a civil nature to which the city is a party. You explain the requestor was laid off from his position with the city, and he has appealed his layoff. You state that, pursuant to section 14-144 of the city's Code of Ordinances, the city's Civil Service Commission (the "commission") is "charged with reviewing the layoff process that causes the layoff of any permanent employee." You further explain that under section 14-191 of the city's Code of Ordinances the commission has the power to administer oaths, subpoena, require the attendance of witnesses, and require the production of certain items, and examine witnesses under oath. However, you also inform this office that section 14-144 provides that the layoffs reviewed and sustained by the commission are final and not subject to any other administrative recourse, review, or appeal process. Furthermore, the submitted information does not reflect the grievant has the opportunity to appeal the commission's decision to any higher adjudicative authority, such as a district court. Consequently, we find you have failed to demonstrate the city's administrative procedure is conducted in a judicial or quasi-judicial forum, and thus, we find such hearings do not constitute litigation for purposes of section 552.103. Therefore, none of the remaining submitted information may be withheld under section 552.103 of the Government Code.

In summary, the city must continue to rely on Open Records Letter No. 2011-16440 as a previous determination and withhold or release the previously ruled upon information in accordance with the prior ruling. The city must release the submitted ordinance. The remaining information must be released.<sup>3</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.

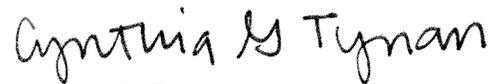
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), 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

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<sup>3</sup>We note the requestor has a special right of access under section 552.023 of the Government Code to some of the information being released in this instance. *See* Gov't Code § 552.023(b) (governmental body may not deny access to person to whom information relates or person's agent on ground that information is considered confidential by privacy principles); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). Therefore, if the city receives another request for this information from a different requestor, the city must again seek a ruling from this office.

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,

A handwritten signature in black ink that reads "Cynthia G. Tynan". The signature is written in a cursive style with a large initial "C".

Cynthia G. Tynan  
Assistant Attorney General  
Open Records Division

CGT/em

Ref: ID# 439317

Enc. Submitted documents

c: Requestor  
(w/o enclosures)