



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 12, 2012

Mr. Warren M. S. Ernst
Chief of the General Counsel Division
City of Dallas
1500 Marilla Street, Room 7BN
Dallas, Texas 75201

OR2012-00654

Dear Mr. Ernst:

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# 442069.

The City of Dallas (the "city") received a request for (1) a named individual's employment records, (2) information pertaining to a specified incident, including documents related to a worker's compensation claim filed by the named individual in connection with the incident, and (3) contract documents pertaining to the restoration and remediation of a specified building. You state you have no information responsive to a portion of the request.¹ You claim the remaining requested information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted representative samples of information.³

¹We note that the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

²We note that although you also raise section 552.107 of the Government Code, you have provided no arguments to support this exception. Accordingly, we find the city has waived its claim under this exception. See Gov't Code § 552.301(e) (governmental body must provide comments stating why exceptions raised should apply to information requested), .302.

³We assume the representative samples of records submitted to this office are 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 those records contain substantially different types of information than that submitted to this office.

Initially, we note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 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 this chapter or 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[.]

Gov't Code § 552.022(a)(1). The submitted information contains a completed evaluation, which is subject to section 552.022(a)(1). Although you raise section 552.103 for this information, section 552.103 is a discretionary exception that does not make information confidential under the Act. *See* Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, §§ 3-21, 23-26, 28-37 (providing for “confidentiality” of information under specified exceptions), *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 No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Accordingly, the evaluation may not be withheld under section 552.103 of the Government Code. As you raise no further exceptions against the disclosure of this information, the evaluation, which we have marked, must be released.

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.

Gov't Code § 552.103(a), (c). The governmental body claiming this exception bears the burden of providing relevant facts and documents to demonstrate the applicability of the exception. The test for meeting this burden is a showing that (1) litigation is 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). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986). When the governmental body is the prospective plaintiff in litigation, the evidence of anticipated litigation must at least reflect that litigation involving a specific matter is “realistically contemplated.” See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (investigatory file may be withheld if governmental body’s attorney determines that it should be withheld pursuant to section 552.103 and that litigation is “reasonably likely to result”).

You contend that the information at issue relates to the city’s subrogation claim against a contractor for a city employee’s job related injury. You state that the city is subrogated to the rights of the injured city employee, and her attorney has agreed to protect the city’s subrogation interest and is working with the city in the prosecution of her claims and the city’s claims in the pending litigation. Additionally, you state the city has a statutory right under the self-insurer provisions of chapter 407 of the Labor Code to formally intervene in the lawsuit to recover its first-money worker’s compensation lien for medical and indemnity benefits paid to, or on behalf of, the employee. Based on your representations and our review, we find the city reasonably anticipated litigation on the date the city received the request for information. We also find the remaining information is related to the litigation. Accordingly, the city may withhold the remaining information under section 552.103 of the Government Code.⁴

We note, however, that once the information has been obtained by all parties to the litigation, no section 552.103(a) interest exists with respect to that information. See Open Records Decision No. 349 at 2 (1982). Further, we note that the applicability of section 552.103(a) ends when the litigation has concluded. See Attorney General Opinion MW-575 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

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

⁴As our ruling is dispositive, we need not address your remaining argument for this information.

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 cursive script, appearing to read 'Lauren E. Kleine'.

Lauren E. Kleine
Assistant Attorney General
Open Records Division

LEK/em

Ref: ID# 442069

Enc. Submitted documents

c: Requestor
(w/o enclosures)