



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 8, 2012

Ms. Jessica Richard  
Assistant City Attorney  
City of New Braunfels  
P.O. Box 311747  
New Braunfels, Texas 78131-1747

OR2012-17978

Dear Ms. Richard:

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# 470772 (ORR# 2012-349).

The City of New Braunfels (the "city") received a request for the personnel files of fourteen named individuals, including the requestor; e-mails between several named individuals that mention the requestor during a specified time period; and complaints concerning a named individual.<sup>1</sup> You claim the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

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<sup>1</sup>You inform us the city provided the requestor with an estimate of charges and a request for a deposit for payment of those charges on August 23, 2012. *See* Gov't Code §§ 552.2615, .263(a). You state the city received a deposit for payment of the anticipated costs on August 23, 2012. Thus, August 23, 2012 is the date on which the city is deemed to have received the request. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date that the governmental body receives deposit or bond). You further state the city sought and received clarification of the information requested. *See id.* § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request), *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

Initially, you state the requestor excludes social security numbers, driver's license numbers, home addresses, personal telephone numbers, and e-mail addresses from the scope of the request. Accordingly, these types of information, which you have redacted from the submitted documents, are not responsive to the request for information. This ruling does not address the public availability of any information that is not responsive to the request and the department is not required to release that information in response to the request.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made 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

...

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

Gov't Code § 552.022(a)(1), (3). The submitted information includes completed evaluations that are subject to subsection 552.022(a)(1) and must be released unless they are excepted from disclosure under section 552.108 of the Government Code or are made confidential under the Act or other law. *See id.* § 552.022(a)(1). The submitted information also contains information in accounts and receipts that are subject to subsection 552.022(a)(3) and must be released unless it is made confidential under the Act or other law. You seek to withhold the information subject to section 552.022 under section 552.103 of the Government Code. However, section 552.103 is a discretionary exception and does not make information confidential under the Act. *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 Gov't Code § 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the information that is subject to section 552.022, which we have marked, may not be withheld under section 552.103 of the Government Code. As you claim no other exception to the disclosure of the marked information, it must be released.

Section 552.103 of the Government Code provides, in relevant 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 has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate: (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 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).*

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See Open Records Decision No. 452 at 4 (1986).* To demonstrate litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* This office has found a pending complaint with the Equal Opportunity Employment Commission ("EEOC") indicates litigation is reasonably anticipated. *See Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982), 281 at 1 (1981).*

You state, and provide documentation showing, prior to the city's receipt of the instant request, the requestor filed discrimination claims against the city with the EEOC. Based on your arguments and our review of the submitted information, we find the city reasonably anticipated litigation on the date this request was received. You also state the remaining information pertains to the substance of the discrimination claims. You explain the requested information consists of documents related to individuals who were in a supervisory position and who were directly involved in the disciplinary process against the requestor or co-workers who worked closely with the requestor. You argue the information relates to the substantive issues in controversy by outlining the city's position and the reasons for actions that were taken. You state the documents demonstrate and relate to the requestor's competency to perform her job and pertain to defense of the requestor's claim of discrimination and retaliation. Based on your representations and our review, we find the city has demonstrated most of the remaining information pertains to the substance of the discrimination claims. However, we find some of the information at issue consists of

general, routine, and administrative e-mail correspondence that does not relate to the discrimination claims and does not otherwise pertain to requestor's specific employment. We find you have failed to demonstrate how this information, which we marked for release, is related to the anticipated litigation for purposes of section 552.103. Accordingly, with the exception of the information we marked for release, the city may withhold the information not subject to section 552.022 under section 552.103 of the Government Code.<sup>2</sup>

Generally, 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 all parties to the pending or anticipated 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 been concluded or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the city must release the information subject to section 552.022 of the Government Code, which we have marked. With the exception of the information we 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](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,



Claire V. Morris Sloan  
Assistant Attorney General  
Open Records Division

CVMS/som

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<sup>2</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure of the information at issue.

Ref: ID# 470772

Enc. Submitted documents

c: Requestor  
(w/o enclosures)