



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 19, 2012

Ms. Victoria Huynh
Deputy City Attorney
City of Plano
P.O. Box 860358
Plano, Texas 75086-0358

OR2012-20445

Dear Ms. Huynh:

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# 474973.

The City of Plano (the "city") received a request for a copy of the requestor's personnel file and any information pertaining to two specified incidents. You state you have given the requestor access to her personnel file. You claim that the submitted 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.

Initially, we note the submitted information contains a completed report and evaluations subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[.]" unless it is excepted by section 552.108 of the Government Code or "made confidential under [the Act] or other law[.]" Gov't Code § 552.022(a)(1). Although you seek to withhold this information under section 552.103 of the Government Code, this section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 439, 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). As such, section 552.103 is not "other law" that makes information confidential for the purposes of section 552.022. Therefore, the city may not withhold the completed report or evaluations, which we have marked, under section 552.103.

As you raise no additional exceptions to disclosure for the information subject to section 552.022(a)(1), it must be released. We will, however, address the city's argument under section 552.103 for the information not subject to section 552.022.

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 raises section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. 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).*

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See Open Records Decision No. 452 at 4 (1986).* To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture."¹ *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example,

¹Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), *see Open Records Decision No. 336 (1982)*; (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see Open Records Decision No. 346 (1982)*; and (3) threatened to sue on several occasions and hired an attorney, *see Open Records Decision No. 288 (1981)*.

the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

You claim the information not subject section 552.022 is excepted under section 552.103 based on an internal discrimination complaint made with city on September 28, 2012. Based on that complaint, you contend the city reasonably anticipates litigation. Upon review, however, we find you have failed to demonstrate a potential opposing party had taken any actual concrete steps towards litigation against the city on the date the request was received. *See id.* Accordingly, the city may not withhold any of the information at issue under section 552.103 of the Government Code.

We note some of the submitted information is subject to section 552.117 of the Government Code.² Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code § 552.117(a)(1). Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the city may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. To the extent the employee timely elected to keep such information confidential under section 552.024, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code. If the employee did not make a timely election under section 552.024, the city may not withhold the information we have marked under section 552.117(a)(1) of the Government Code.

We note the submitted information includes information that is excepted from disclosure under section 552.102(a) of the Government Code. Section 552.102(a) excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). The Texas Supreme Court held section 552.102(a) excepts from disclosure the dates of birth of state employees in the payroll database of the Texas Comptroller of Public Accounts. *Tex. Comptroller of Pub. Accounts v. Attorney Gen. of Tex.*, 354 S.W.3d 336 (Tex. 2010). The city must

²The Office of the Attorney General will raise a mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470.

withhold the information we have marked in the remaining information under section 552.102(a) of the Government Code.

In summary, the city must release the completed report and evaluations we have marked under section 552.022(a)(1) of the Government Code. To the extent the employee timely elected to keep their information confidential under section 552.024, the city must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The city must withhold the information we have marked under section 552.102 of the Government Code. The city must release the remaining information.

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,



Jeffrey W. Giles
Assistant Attorney General
Open Records Division

JWG/dls

Ref: ID# 474973

Enc. Submitted documents

c: Requestor
(w/o enclosures)