



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 30, 2013

Mr. Gary B. Lawson
Counsel for the Dallas Police & Fire Pension System
Strasburger & Price, L.L.P.
901 Main Street, Suite 4400
Dallas, Texas 75202

OR2013-07121

Dear Mr. Lawson:

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# 485770.

The Dallas Police and Fire Pension System (the "system"), which you represent, received a request for six categories of information pertaining to the Museum Tower.¹ You state the system does not have information responsive to five categories of the request.² You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.104, 552.107, 552.110, 552.111, and 552.143 of the Government Code, and privileged

¹You inform us the system sought and received clarification of the request. See Gov't Code § 552.222(b) (providing that 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 governmental entity, acting in good faith, requests clarification or narrowing of unclear or overbroad request for public information, ten-day period to request attorney general ruling is measured from date request is clarified or narrowed).

²The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

under Texas Rules of Civil Procedure 192.3 and 192.5 and Texas Rule of Evidence 503.³ We have considered your arguments and reviewed the submitted representative sample of information.⁴

Initially, we note a portion of the submitted information was created after the request was received. This information, which we have marked, is not responsive to the instant request for information. This ruling does not address the public availability of non-responsive information, and the system is not required to release non-responsive information in response to this request.

Next, you inform us some of the responsive information was previously the subject of prior a request for information, as a result of which this office issued Open Records Letter No. 2012-13914 (2012). In that ruling, we determined, with the exception of information the system must release pursuant to subsections 552.0225(b)(2)-(9), (11), and (13)-(16) of the Government Code, the system must withhold the submitted information under section 552.143(c) of the Government Code. We have no indication the law, facts, and circumstances on which our prior ruling was based have changed. Accordingly, to the extent the responsive information is identical to the information previously requested and ruled upon by this office in that prior ruling, the system must continue to rely on Open Records Letter No. 2012-13914 as a previous determination and withhold or release identical information in accordance with that 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 prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes information is or is not excepted from disclosure). To the extent the information responsive to the present request is not encompassed by the previous ruling, we will consider your arguments.

You argue some of the responsive information is excepted from public disclosure under section 552.101 of the Government Code⁵ in conjunction with Texas Rules of Civil

³Although it appears you raise section 552.022 of the Government Code as an exception to disclosure, we note section 552.022 is not an exception to disclosure. Rather, section 552.022 enumerates categories of information that are not excepted from disclosure unless they are made confidential under the Act or other law. *See* Gov't Code § 552.022.

⁴We assume 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 those records contain substantially different types of information than that submitted to this office.

⁵Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101.

Procedure 192.3 and 192.5 and Texas Rule of Evidence 503.⁶ We note this office generally does not address discovery and evidentiary rules that may or may not be applicable to information submitted to our office by a governmental body. *See* Open Records Decision No. 416 (1984) (finding that even if evidentiary rule specified that certain information may not be publicly released during trial, it would have no effect on disclosability under Act). However, the Texas Supreme Court has ruled the Texas Rules of Civil Procedure and the Texas Rules of Evidence are “other law” that make information confidential for the purposes of section 552.022 of the Government Code. *In re City of Georgetown*, 53S.W.3d 328 (Tex. 2001); *see also* Gov’t Code § 552.022 (enumerating several categories of information not excepted from required disclosure unless expressly confidential under the Act or other law). In this instance, the responsive information does not fall into one of the categories of information made expressly public by section 552.022 of the Government Code. Therefore, the Texas Rules of Civil Procedure and Texas Rules of Evidence are not applicable. We also note that section 552.101 does not encompass civil discovery privileges. *See* Open Records Decision No. 647 at 2 (1996). Accordingly, we conclude the system may not withhold any portion of the responsive information pursuant to section 552.101 of the Government Code in conjunction with the Texas Rules of Civil Procedure or the Texas Rules of Evidence.

Section 552.103 of the Government Code provides in relevant part as follows:

(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 to show section 552.103(a) 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 the governmental body received the request for information,

⁶We note the proper exceptions to raise when asserting the attorney-client privilege and work product privilege for information not subject to section 552.022 of the Government Code are sections 552.107 and 552.111 of the Government Code, respectively. *See* Open Records Decision Nos. 676 at 1-2 (2002), 677 (2002).

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, 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551.

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.” *See* Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, 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.⁷ 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 that 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). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You contend the system reasonably anticipates litigation because it is currently in a dispute with the Nasher Sculpture Center (the “Nasher”). You explain representatives of the Nasher have made allegations that glare emanating from the glass walls of the Museum Tower, a high-rise residential condominium owned by the system, is damaging the Nasher’s art and vegetation and creating an unpleasant experience for visitors. You state representatives of the Museum Tower and the Nasher recently participated in mediation efforts, which were unsuccessful. You indicate all efforts short of litigation to resolve the dispute have failed and state the system anticipates being a party to a suit regarding the Museum Tower. You also argue there would be legal and financial recourse against the system as a result of any lawsuit. Based on your representations and our review, we determine the system has established it reasonably anticipated litigation on the date it received the request for information. We also find the information at issue is related to this anticipated litigation.

⁷In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); 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 threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

Accordingly, the system may withhold the responsive information under section 552.103 of the Government Code.⁸

However, once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the system must continue to rely on Open Records Letter No. 2012-13914 as a previous determination and withhold or release the information we previously ruled on in accordance with that prior ruling. The system may withhold the remaining responsive information under section 552.103 of the Government Code.

You ask this office to “rule that the [s]ystem is entitled to rely upon . . . Open Records Decision 2012-13914 and [the] letter ruling here to reject further requests by any requestor concerning the workings of [the] Museum Tower[.]” We note a governmental body may not “reject” requests for information based on their subject matter. Gov’t Code § 552.301(a) (governmental body that receives request for information that it wishes to withhold must ask for decision from our office if there has not been previous determination). However, in Open Records Decision No. 673, we found a governmental body may rely on a prior ruling as a previous determination so long as the law, facts, and circumstances on which the prior ruling was based have not changed and the requested information is precisely the same information as was addressed in the prior attorney general ruling, the ruling is addressed to the same governmental body, and the ruling concludes that information is or is not excepted from disclosure. Accordingly, if the system receives another request for information pertaining to the Museum Tower, the system may only rely on this ruling or Open Records Letter No. 2012-13914 as a previous determination, and withhold or release the information at issue in accordance with the prior ruling, if the information at issue is identical to the previously ruled upon information and the other requirements described above are met. Conversely, if the information in a future request is not identical to that at issue in the prior rulings, the system must respond to the future request and comply with the Act. *Id.* § 552.301.

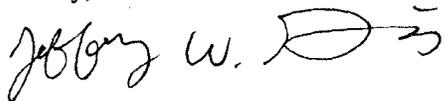
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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

⁸As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

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,

A handwritten signature in black ink that reads "Jeffrey W. Giles". The signature is written in a cursive style with a large, stylized "J" and "G".

Jeffrey W. Giles
Assistant Attorney General
Open Records Division

JWG/dls

Ref: ID# 485770

Enc. Submitted documents

c: Requestor
(w/o enclosures)