



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

June 20, 2013

Mr. Gary B. Lawson  
Strasburger & Price, LLP  
901 Main Street, Suite 4400  
Dallas, Texas 75202-3794

OR2013-10448

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# 490640.

The Dallas Police and Fire Pension System (the "system"), which you represent, received a request for all e-mails received or sent by four named employees that contain any of four specified terms during a specified time period. You state the system released some of the requested information. You claim the remaining requested information is excepted from disclosure under sections 552.103, 552.104, 552.105, 552.107, 552.110, 552.111, and 552.143 of the Government Code and privileged pursuant to Texas Rule of Evidence 503 and Texas Rules of Civil Procedure 192.3 and 192.5.<sup>1</sup> We have considered your arguments and reviewed the submitted representative sample of information.<sup>2</sup> We have also received

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<sup>1</sup>Although you also raise section 552.101 of the Government Code in conjunction with the attorney-client privilege under Texas Rule of Evidence 503, the consulting expert privilege under Texas Rule of Civil Procedure 192.3, and the attorney work product privilege under Texas Rule of Civil Procedure 192.5, this office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). Further, although you also raise section 552.022 of the Government Code, that provision is not an exception to disclosure. Rather, section 552.022 enumerates categories of information that are not excepted from disclosure unless they are expressly confidential under other law. *See* Gov't Code § 552.022.

<sup>2</sup>We 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 that those records contain substantially different types of information than that submitted to this office.

and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we address the requestor's assertion the system did not comply with the Act's procedural requirements under section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply not later than the tenth business day after the date of receiving the written request. *See id.* § 552.301(b). Pursuant to section 552.301(e) of the Government Code, a governmental body is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e).

You state the system received the request for information from the requestor on February 25, 2013. You inform us over 50,000 documents were responsive to the initial request, which was for e-mails received or sent by four named employees that contain any of six specified terms during a specified time period.

You state, and provide documentation showing, that within ten business days of receiving the February 25, 2013, request, the system advised the requestor by e-mail of the large amount of responsive information, explained that many of these documents only contained the requested terms in the automated document footers, and opened a discussion with the requestor as to how the request could be narrowed pursuant to section 552.222. On March 14, 2013, the requestor agreed to narrow his request by omitting two of the original six terms and asked the system how many documents were responsive to one of the remaining four terms. On April 1, 2013, the system informed the requestor of the number of documents responsive to the specified term and, on that same day, the requestor responded with the final narrowing of his request, stating he seeks e-mails containing the specified term and the three remaining terms.

The requestor asserts that because he narrowed his request in his March 14, 2013, communication, the system was required to request a ruling from this office within ten business days of receiving his March 14, 2013, communication. Section 552.222(b) provides that "[i]f a large amount of information has been requested, the governmental body may discuss with the requestor how the scope of a request might be narrowed[.]" *Id.* § 552.222(b). The purpose of section 552.222 is to authorize a dialogue between the governmental body and the requestor regarding the scope of the records request. In *City of Dallas v. Abbott*, 304 S. W.3d 380 (Tex. 2010), the Texas Supreme Court held that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed. *See id.* at 384.

Here, although the requestor responded to the system for clarification and narrowing of his request, he also continued the discussion of how to narrow his request with the system by asking questions about the responsive information and, in his April 1, 2013, communication finalized his request by stating he would like e-mails containing four of the original six specified terms. We have no indication the system did not act in good faith in seeking narrowing of the request. *See id.* Accordingly, based on the submitted documentation, we find the system's ten- and fifteen-business-day periods under section 552.301(b) and 552.301(e) for requesting this decision commenced on April 1, 2013, the date on which the system received the final narrowing of the request. Thus, the system's ten-business-day deadline was April 15, 2013, and the system's fifteen-business-day deadline was April 22, 2013. We note the system requested a ruling from this office and submitted some of the information at issue on April 15, 2013, and submitted the remaining information at issue on April 22, 2013. Accordingly, we find the system timely complied with the procedural requirements mandated by section 552.301 of the Government Code in requesting this decision.

Next, you inform us some of the requested information was the subject of previous requests for information, in response to which this office issued Open Records Letter Nos. 2012-13914 (2012), 2013-04717 (2013), 2013-05330 (2013). In Open Records Letter No. 2012-13914, 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 information at issue under section 552.143(c) of the Government Code. In Open Records Letter No. 2013-04717, we determined the system: (1) must withhold certain information under section 552.143(c) of the Government Code, (2) may withhold certain information under sections 552.103 and 552.111 of the Government Code, (3) must withhold certain e-mail addresses under section 552.137 of the Government Code, unless the owners affirmatively consent to their disclosure, and (4) must release the remaining information. In Open Records Letter No. 2012-05330, we determined the system must withhold certain information under section 552.143(c) of the Government Code and may withhold the remaining information at issue under section 552.107(1) of the Government Code. We have no indication the law, facts, and circumstances on which our prior rulings were based have changed. Accordingly, to the extent the requested information is identical to the information previously requested and ruled upon by this office in these prior rulings, the system must continue to rely on Open Records Letter Nos. 2012-13914, 2013-04717, 2013-05220 as previous determinations and withhold or release identical information in accordance with these rulings. *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 rulings, we will consider your arguments.

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, 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.<sup>3</sup> Open Records Decision No. 555 (1990); *see* 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).

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<sup>3</sup>In 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).

You contend the system reasonably anticipates litigation because it is currently in a dispute with the Nasher Sculpture Center (the "Nasher"). You explain the Nasher has made allegations that glare emanating from the glass walls of the Museum Tower, L.P. (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 Museum Tower and the Nasher 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 Museum Tower, and you argue there would be legal and financial recourse against the system as a result of any suit. 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 litigation the system anticipated on the date of its receipt of the request for information.

However, we note the opposing party in the anticipated litigation has seen or had access to some of the information at issue. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Thus, if the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). The information we have marked consists of e-mails from officials of the Nasher. This information is not protected by section 552.103 and may not be withheld on that basis. Accordingly, except for the information we have marked, the system may withhold the information you have marked under section 552.103 of the Government Code.<sup>4</sup> We note 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).

Section 552.104 of the Government Code excepts from required public disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. This exception protects a governmental body's interests in connection with competitive bidding and in certain other competitive situations. *See* Open Records Decision No. 593 (1991) (construing statutory predecessor). Section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990).

You raise section 552.104 of the Government Code for some of the remaining information. However, you do not explain how release of this information would harm the system in a particular competitive situation. Accordingly, we find you have failed to demonstrate the

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<sup>4</sup>As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

applicability of section 552.104, and the system may not withhold any of the remaining information under section 552.104 of the Government Code.

You argue some of the remaining information is excepted from disclosure under section 552.143 of the Government Code, which provides, in part,

(c) All information regarding a governmental body's direct purchase, holding, or disposal of restricted securities that is not listed in Section 552.0225(b)(2)-(9), (11), (13)-(16) is confidential and excepted from the requirements of Section 552.021. This Subsection does not apply to a governmental body's purchase, holding, or disposal of restricted securities for the purpose of reinvestment nor does it apply to a private investment fund's investment in restricted securities.

Gov't Code § 552.143(c). You argue the information pertains to the system's direct purchase, holding, or disposal of restricted securities. *See id.* § 552.143(d)(3) (defining "restricted securities" for purposes of section 552.143); *see also* 17 C.F.R. § 230.144(a)(3) (defining "restricted securities" as "securities acquired directly or indirectly from the issuer, or from an affiliate of the issuer, in a transaction or chain of transactions not involving public offering"). You inform us some of the information at issue involves Museum Tower, which you state is not a governmental body. You state the system's limited partnership interest in the Museum Tower is a security acquired directly from the issuer of the security, the Museum Tower, in a transaction that did not involve a public offering. Additionally, some of the information at issue pertains to the Highland Crusader Fund and Highland Crusader Fund II, which you state constitute restricted securities for purposes of section 552.143(c). Based on your representations and our review, we find the system has demonstrated the applicability of section 552.143 to some of the information at issue. Thus, the system must withhold the information we have marked under section 552.143 of the Government Code. However, we find the system has failed to demonstrate the applicability of section 552.143 to any of the remaining information at issue. Accordingly, none of the remaining information at issue may be withheld on this basis.

We note some of the remaining information consists of personal e-mail addresses subject to section 552.137 of the Government Code.<sup>5</sup> Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). The e-mail addresses at issue are not a type specifically excluded by section 552.137(c). Accordingly, the system must withhold the e-mail addresses we have

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<sup>5</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

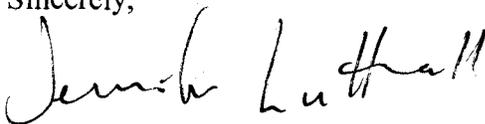
marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure.

In summary, to the extent the requested information is identical to the information previously requested and ruled upon by this office in these prior rulings, the system must continue to rely on Open Records Letter Nos. 2012-13914, 2013-04717, 2013-05220 as previous determinations and withhold or release identical information in accordance with these rulings. Except for the information we have marked, the system may withhold the information it has marked under section 552.103 of the Government Code. The system must withhold the information we have marked under section 552.143 of the Government Code. The system must withhold the e-mail addresses we have marked under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure. The remaining information must be released.

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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Jennifer Luttrall  
Assistant Attorney General  
Open Records Division

JL/som

Ref: ID# 490640

Enc. Submitted documents

c: Requestor  
(w/o enclosures)