



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

This ruling has been modified by court action
The ruling and judgment can be viewed in PDF
format below.



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 9, 2013

Ms. Jessica D. Richard
Assistant City Attorney
City of New Braunfels
424 South Castell Avenue
New Braunfels, Texas 78130

The ruling you have requested has been amended as a result of litigation and has been attached to this document.

OR2013-11608

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# 492471 (City ORR# 2013-167).

The City of New Braunfels (the "city") received a request for certain correspondence from a named individual regarding a specified lawsuit. You claim the submitted information is excepted from disclosure under section 552.103 of the Government Code and privileged under Texas Rule of Evidence 408. We have considered your arguments and reviewed the submitted information.

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 city has the burden of providing relevant facts and documents to show the section 552.103(a) exception 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 of the receipt of the request for information and (2) the information at issue is related to the pending or anticipated 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 city must meet both prongs of this test for information to be excepted under section 552.103(a).

You raise section 552.103 for the submitted information. You state, and have provided documentation showing that prior to the city's receipt of the request, a lawsuit styled *Richard Zapata v. City of New Braunfels, et al*, Cause No. C2013-0338B, was filed in the District Court of Comal County, Texas, 207th Judicial District and is currently pending. Based on your representations and our review, we determine litigation was pending on the date the city received the request for information. You state the information at issue relates to this lawsuit. Based on your representations and our review, we find the information at issue is related to the pending litigation for the purposes of section 552.103.

We note, however, that the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* ORD 551 at 4-5. Therefore, if the opposing party has seen or had access to information relating to pending litigation through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). In this instance, the opposing party in the pending litigation has already seen or had access to the submitted information. Thus, the submitted information, which has been seen by the opposing party, may not be withheld from the requestor under section 552.103 of the Government Code.

You also claim the submitted information is privileged under Texas Rule of Evidence 408. Rule 408 governs the admissibility of information developed through compromise negotiations. *See* Tex. R. Evid. 408. However, rule 408 does not expressly make information confidential. *See generally* Open Records Decision Nos. 658 at 4 (1998) (stating that statutory confidentiality provision must be express and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (stating that, as general rule, statutory confidentiality requires express language making information confidential), 465 at 4-5 (1987). Accordingly, the city may not withhold any of the submitted information under rule 408 of the Texas Rules of Evidence.

We note some of the submitted information is subject to section 552.137 of the Government Code, which 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).¹ Gov’t Code § 552.137(a)-(c). Upon review, we have marked an e-mail address that is not specifically excluded by section 552.137(c). *See id.* § 552.137(c). As such, the e-mail address we have marked must be withheld under section 552.137 of the Government Code, unless its owner affirmatively consents to its release. *See id.* § 552.137(b). As you raise no further exceptions to disclosure, 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.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 Burnett
Assistant Attorney General
Open Records Division

JB/tch

Ref: ID# 492471

Enc. Submitted documents

c: Requestor
(w/o enclosures)

¹The 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).

OCT 14 2014

At 5:00 M.
Amalia Rodriguez-Mendoza, Clerk

CAUSE NO. D-1-GV-13-000762

CITY OF NEW BRAUNFELS, TEXAS	§	IN THE DISTRICT COURT OF
Plaintiff	§	
V.	§	345th JUDICIAL DISTRICT
GREG ABBOTT, ATTORNEY	§	
GENERAL OF TEXAS,	§	
Defendant	§	TRAVIS COUNTY, TEXAS

FINAL JUDGMENT

On June 17, 2014, Plaintiff filed its Motion for Summary Judgment. On June 19, 2014, Defendant filed his Cross Motion for Summary Judgment. On July 10, 2014, a hearing was held on both Motions. It was determined and ordered on July 11, 2014 that Plaintiff's Motion for Summary Judgment be granted and Defendants be denied. The remaining issue of attorney's fees was undecided at that time. Afterwards the parties agreed to bear their own attorney's fees and costs and submitted this final judgment for entry. Therefore, after reviewing the pleadings on file, and considering the arguments, evidence and authority presented, the Court renders this Final Judgment on the following issues, such issues being presented by all Parties. The Court finds as follows:

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Plaintiff City of New Braunfels' requested relief as to compliance with the Texas Public Information Act is granted and Plaintiff is a prevailing party.

IT IS ORDERED, ADJUDGED and DECREED that the City of New Braunfels need not disclose any settlement correspondence related to *Zapata v City of New Braunfels*; Cause No. 2013-8338B (In the District Court, 207th Judicial District, Comal County, Texas).

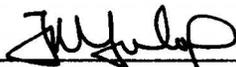
IT IS FURTHER ORDERED, ADJUDGED and DECREED that the Defendant's requests for relief are denied;

IT IS FURTHER ORDERED, ADJUDGED and DECREED all costs including court costs are hereby assessed against the party incurring same. All claims for attorney's fees have been withdrawn.

The court orders execution to issue for this judgment.

All relief not expressly granted herein, is hereby denied. This judgment is final and disposes of all claims and all parties, and is appealable.

SIGNED ON THIS 14TH DAY OF OCTOBER, 2014.



JUDGE PRESIDING

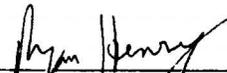
AGREED:

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AGREED AS TO FORM:

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BY:



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BY:



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GREG ABBOTT, AG OF TEXAS**