



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 5, 2013

Mr. Ray Rodriguez  
Assistant City Attorney  
City of San Antonio  
P.O. Box 839966  
San Antonio, Texas 78283-3966

OR2013-15506

Dear Mr. Rodriguez:

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# 498487 (COSA File Nos. W016261-061313 and W016749-070313).

The City of San Antonio (the "city") received two requests from different requestors for maintenance records, incident reports, inspection reports, contact information for specified individuals, and complaints made regarding an escalator at the city's convention center from specified periods of time. You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, we note some of the requested information may have been the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2013-13672 (2013) and 2013-14887 (2013). In Open Records Letter No. 2013-13672, we determined with the exception of the marked completed reports subject to section 552.022(a)(1) and the video recordings responsive to the first two requests for

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<sup>1</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 those records contain substantially different types of information than that submitted to this office.

information, which must be released, the city may withhold the remaining responsive information under section 552.103 of the Government Code. In Open Records Letter No. 2013-14887, we relied on Open Records Letter No. 2013-13672 as a previous determination, and further determined the city may withhold the responsive information it marked that is not subject to subsection 552.022(a)(1) of the Government Code under section 552.103 of the Government Code and must (1) withhold cellular telephone numbers under section 552.117(a)(1) of the Government Code, to the extent the individuals at issue timely elected confidentiality under section 552.024 of the Government Code and a governmental body does not pay for the cellular telephone service, (2) withhold e-mail addresses under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure, and (3) release the remaining information. You now seek to withhold the submitted information under sections 552.103 and 552.111 of the Government Code. Section 552.007 of the Government Code provides that, if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the city may not now withhold any previously released information unless its release is expressly prohibited by law or the information is confidential under law. Although you raise sections 552.103 and 552.111 of the Government Code, these sections do not prohibit the release of information or make information confidential. *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 section 552.103); Open Records Decision Nos. 470 at 7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Thus, the city may not now withhold any of the previously released information under section 552.103 or section 552.111. We have no indication there has been any change in the law, facts, or circumstances on which the previous rulings were based. Accordingly, to the extent the requested information is identical to the information previously requested and ruled upon by this office, we conclude the city must rely on Open Records Letter Nos. 2013-13672 and 2013-14887 as previous determinations and withhold or release the identical information in accordance with those 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 that information is or is not excepted from disclosure). To the extent the requested information is not encompassed by the prior rulings, we will consider the exceptions you claim.

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[.]

Gov't Code § 552.022(a)(1). The submitted information contains completed reports that are subject to subsection 552.022(a)(1). The city must release the completed reports pursuant to subsection 552.022(a)(1) 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.* You seek to withhold the completed reports subject to subsection 552.022(a)(1) under sections 552.103 and 552.111 of the Government Code. However, sections 552.103 and 552.111 are discretionary exceptions and do not make information confidential under the Act. *See Dallas Area Rapid Transit*, 4 S.W.3d at 475-76; *see also* ORDs 470 at 7, 665 at 2 n.5, 663 at 5. Therefore, the completed reports subject to subsection 552.022(a)(1), which we have marked, may not be withheld under section 552.103 or section 552.111 of the Government Code. As you raise no other exceptions to the disclosure of the marked completed reports, they must be released pursuant to section 552.022(a)(1) of the Government Code. However, we will address your arguments against disclosure of the remaining information.

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 litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *See* Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim 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. *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, or when an individual threatened to sue on several occasions and hired an attorney. *See* Open Records Decision Nos. 346 (1982), 288 (1981). In Open Records Decision No. 638 (1996), this office stated a governmental body has met its burden of showing that litigation is reasonably anticipated when it received a notice of claim letter and the governmental body represents that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act (“TTCA”), Civ. Prac. & Rem. Code, ch. 101. If that representation is not made, the receipt of the claim letter is a factor we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established litigation is reasonably anticipated. *See* ORD 638 at 4.

You inform us, and provide documentation showing, prior to the city's receipt of the instant requests for information, the city received a notice of claim letter from an attorney concerning the accident at issue. You do not state this letter meets the requirements of the TTCA. However, we note this letter concerns injuries sustained by the attorney's client and states, “[O]ur client's injuries are a direct and proximate result of your negligence.” The letter further states, “We would appreciate your cooperation in having a representative of your insurance company contact the undersigned.” Accordingly, based on our review of the notice, the information at issue, and the totality of the circumstances, we find the city reasonably anticipated litigation on the date it received the requests. Furthermore, we find the information at issue relates to the reasonably anticipated litigation. Accordingly, we conclude the city may withhold the submitted information that is not subject to

subsection 552.022(a)(1) of the Government Code 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, to the extent the requested information is identical to the information previously requested and ruled upon by this office, we conclude the city must rely on Open Records Letter Nos. 2013-13672 and 2013-14887 as previous determinations and withhold or release the identical information in accordance with those rulings. The city must release the marked completed reports pursuant to section 552.022(a)(1) of the Government Code. 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.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,



Sarah Casterline  
Assistant Attorney General  
Open Records Division

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

Ref: ID# 498487

Enc. Submitted documents

c: Two Requestors  
(w/o enclosures)