



February 5, 1999

Mr. John Steiner
Division Chief
City of Austin Law Department
P. O. Box 1546
Austin, Texas 78767-1546

OR99-0346

Dear Mr. Steiner:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 121873.

The City of Austin (the "city") received a request for several items of information concerning Austin Energy including "[d]etail support of the environmental assessment performed on the Financial/Fiscal Service Department." You contend that the requested documents are excepted from disclosure pursuant to sections 552.103 and 552.111 of the Government Code. We have considered the exceptions you claim and have reviewed the documents at issue.

You claim that all of the requested documents are excepted from disclosure pursuant to section 552.103. Section 552.103(a) excepts from disclosure information:

- (1) relating to litigation of a civil or criminal nature or settlement negotiations, 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; and
- (2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas 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 552.103(a).

To establish that 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." Open Records Decision No. 452 at 4 (1986). 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.¹ 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). Having carefully considered your arguments, we conclude that the city does not reasonably anticipate litigation against the requestor's client at this time. Thus, the documents at issue are not excepted from disclosure under section 552.103(a).

You also contend that documents relating to the Austin Energy Finance Assessment and Accounting Project are excepted from disclosure pursuant to section 552.111. The documents at issue under section 552.111 include employee surveys and interviews, work papers, and recommendations and findings. Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. *Garland v. Dallas Morning News*, 969 S.W.2d 548, 557 (Tex. App.--Dallas 1998, pet. requested) (*citing Lett v. Klein Indep. Sch. Dist.*, 917 S.W.2d 455, 457 (Tex. App.--Houston [14th Dist.] 1996), *writ denied per curiam*, 41 Tex. Sup. Ct. J. 575 (1998) (documents relating to

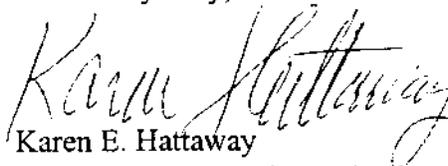
¹In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney 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).

problems with specific employee do not relate to the making of new policy but merely implement existing policy)). ORD 615 at 5-6. In addition, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. ORD 615 at 4-5.

We agree that the documents at issue under section 552.111 relate to the city's policymaking functions. *See* Open Records Decision No. 631 (1995). However, many documents contain purely factual information that is not protected under section 552.111. For example, we have previously held that a compilation of survey results broken down into percentages was not protected by section 552.111. Open Records Decision Nos. 419 at 4 (1984), 209 at 3 (1978). The aggregate survey results and all other underlying factual material must be released. On the other hand, portions of these documents reflect the advice, opinion, and recommendations of city employees regarding Austin Energy's financial accountability. We have marked these portions of the documents accordingly, and the city may withhold the marked information from disclosure under section 552.111. The city must release all of the remaining information to the requestor.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Karen E. Hattaway
Assistant Attorney General
Open Records Division

KEH/ch

Ref: ID# 121873

Enclosures: Marked documents

cc: Mr. Jamie Balagia
Law Office of Jamie Balagia
12012 North IH 35
Austin, Texas 78753
(w/o enclosures)