OFFICE OF THE ATTORNEY GENERAL · STATE OF TEXAS
JOHN CORNYN

November 16, 1999

Ms. Laura Prendergast Gordon
Assistant City Attorney
City of El Paso
2 Civic Center Plaza - 9th Floor
El Paso, Texas 79901-1196

OR99-3255

Dear Ms. Gordon:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 130632.

The City of El Paso (the "city") received a request from Robert W. Tinnell, an attorney representing Ms. Maria Rodriguez, for "copies of any incident reports filed by employees of Sun Metro concerning [a claim filed by Ms. Maria Rodriguez] as well as any notices and statements given by [Ms. Maria Rodriguez] with regard to the incident of April 28, 1998." You have provided information responsive to the request, marked as Exhibit "B." You assert the requested information may be withheld under section 552.103 of the Government Code. We have considered the exception you claim and have reviewed the information at issue.

Section 552.103(a) excepts from disclosure information:

> [R]elating 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[.]

Gov't Code § 552.103. Section 552.103(a) was intended to prevent the use of the Public Information Act as a method of avoiding the rules of discovery in litigation.[1] Attorney General Opinion JM-1048 at 4 (1989). The litigation exception enables a governmental body to protect its position in litigation by requiring information related to the litigation to be obtained through discovery. Open Records Decision No. 551 at 3 (1990).

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).

Under Open Records Decision No. 638 (1996), a governmental body may establish that litigation is reasonably anticipated by showing that (1) it has received a claim letter from an allegedly injured party or his attorney and (2) stating that the letter complies with the notice of claim provisions of the Texas Tort Claims Act ("TTCA") or applicable municipal statute or ordinance. You have submitted to this office a letter from an attorney (the requestor) which indicates that attorney is representing a party allegedly injured on a city bus on April 29, 1998. Exhibit "C" additionally contains a notice of claim from that party which you have stated satisfies the requirements of the TTCA. Our review of the information in Exhibit "B" additionally confirms your assertion that the information is related to the anticipated litigation. Thus, the city has met its burden of showing that litigation is reasonably anticipated and that the information relates to the anticipated litigation. The information at issue may be withheld pursuant to section 552.103(a).

In reaching this conclusion, however, we assume that the opposing party to the anticipated litigation has not previously had access to the records at issue. Absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). If the opposing parties in the anticipated litigation have seen or had access to any of the information in these records, there would be no justification for now withholding that information from the requestor pursuant to section 552.103(a). We also note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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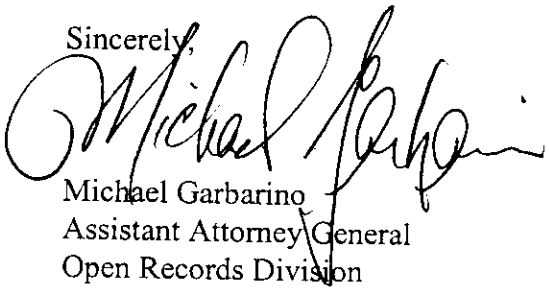
[1]The Public Information Act is not a substitute for the discovery process under the Texas Rules of Civil Procedure. *See* Attorney General Opinion JM-1048 at 3 (1989) (the fundamental purposes of the Public Information Act and of civil discovery provisions differ); Open Records Decision No. 551 at 3-4 (1990) (discussion of relation of Public Information Act to discovery process).

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.

Sincerely,



Michael Garbarino
Assistant Attorney General
Open Records Division

MG/jc

Ref: ID# 130632

Encl. Submitted documents

cc: Robert W. Tinnell
Attorney at Law
1108 North Campbell
El Paso, Texas 79902
(w/o enclosures)