



June 25, 2001

Ms. Sharon Hicks
City Attorney
City of Abilene
P.O. Box 60
Abilene, Texas 79604

OR2001-2689

Dear Ms. Hicks:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 148709.

The City of Abilene (the "city") received a written request from a former city employee for the following categories of information:

- a) All of my employee evaluations and any written correspondence of any of my superiors thereof.
- b) All of my employee records and any written correspondence of any of my superiors thereof.

You state that the city has released all of these documents to the requestor. However, the requestor also seeks certain records pertaining to two particular public housing rehabilitation projects:

- c) All of my written inspection reports in regard to Subject CIAP Projects; [and]
- d) All of my written correspondence in regard to any topic of Subject CIAP Projects; ie requests, recommendations, statements, inter-office memos, daily

reports, weekly reports, any correspondence with anyone pertaining to Subject CIAP Projects.

You contend that the information responsive to items 3 and 4 are excepted from required public disclosure pursuant to section 552.103 of the Government Code.

Section 552.103 is commonly referred to as the "litigation exception." Under section 552.103(a) and (c), the governmental body raising this exception must demonstrate that (1) litigation involving the governmental body was pending or reasonably anticipated at the time of the records request, and (2) the information at issue is related to that litigation. *See also 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103.

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). You have provided this office with a notice of claim that the city received from the contractor doing the rehabilitation work on the two housing projects. The contractor alleges several causes of action against the city in connection with the work performed, and seeks damages in excess of one million dollars. Given these facts, we conclude that you have demonstrated that litigation involving the city was reasonably anticipated on the date the city received the records request. Furthermore, after reviewing the records you seek to withhold, we conclude that these documents "relate" to the litigation for purposes of section 552.103. Accordingly, the city may withhold most of the information at issue at this time pursuant to section 552.103 of the Government Code.

We note, however, that some of the information at issue has either been provided to the city by, or previously released by the city to, the contractor that filed the notice of claim. Absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Consequently, to the extent that the contractor has seen or had access to the information at issue, there would be no justification for now withholding that information from the requestor pursuant to section 552.103.¹ We have placed yellow flags on the documents that clearly have been in the possession of contractor and thus must be released to the requestor. The city must also release any other documents to which the contractor has had prior access. All remaining documents may be withheld at this time pursuant to section 552.103 of the Government Code.

¹We also note that the applicability of section 552.103 ends once the litigation, or likelihood thereof, has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script that reads "J. Steven Bohl". The signature is written in black ink and is positioned above the typed name.

J. Steven Bohl
Assistant Attorney General
Open Records Division

JSB/RWP/seg

Ref: ID# 148709

Enc. Submitted documents

c: Mr. Mark Jones
4509 West Pioneer Drive, #824
Irving, Texas 75061
(w/o enclosures)