



October 2, 2001

Mr. Edward H. Perry
Assistant City Attorney
City of Dallas
1500 Marilla, Room 7BN
Dallas, Texas 75201

OR2001-4423

Dear Mr. Perry:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 152682.

The City of Dallas (the "city") received requests for the following information:

- (1) correspondence with Walter Booth and/or Booth Research Group, Inc. (collectively referred to as "Booth") concerning the Dallas Firefighter Lieutenant and Captain's Oral Assessments (the "assessments") from the year 2000;
- (2) documents relating to complaints about the assessments;
- (3) documents relating to questions or materials submitted by Booth for approval by the city in connection with the assessments and promotion examinations;
- (4) video, audio, and stenographic recordings of the orientation session conducted by Booth in relation to the assessments and promotion examinations;
- (5) video, audio, and stenographic recordings of the assessments and promotion examinations;
- (6) video, audio, and stenographic recordings of meetings conducted by the city or Booth regarding the assessments and promotion examinations;
- (7) documents relating to the guidelines and instructional materials provided to individuals who conducted the assessments and promotion examinations;

(8) documents relating to the materials provided to individuals who took the assessments and promotion examinations; and

(9) contracts and agreements between the city and Booth for the conduction of the assessments.

You indicate that you do not have information responsive to the third, fifth, and sixth requests. We note that the Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). You also indicate that you will provide the requestor information responsive to the ninth request. However, you claim that the remainder of the requested information is excepted from disclosure under sections 552.101, 552.103, 552.117, and 552.122 of the Government Code. Furthermore, you indicate that the request may implicate the proprietary interests of a third party—Booth. Consequently, you notified Booth of the request pursuant to section 552.305 of the Government Code. We note, however, that Booth has not submitted any arguments to our office in response. We have considered the exceptions you claim and reviewed the submitted information.¹

We begin by noting that this office has already ruled on a portion of the submitted information. You previously sought an open records decision from this office with regard to an open records request for a specific employee's Fire Operations Lieutenant Oral Assessment file. This office assigned your request ID# 137394 and issued a ruling, Open Records Letter No. 2000-2829 (2000), in which we found that while a portion of the submitted information was excepted under section 552.122, other portions were not. Now, you have a pending lawsuit filed against the Office of the Attorney General over the release of the information in question in Open Records Letter No. 2000-2829 (2000).² When an open records ruling of this office is challenged in court, this office allows the trial court to resolve the issue of whether the information at issue is subject to public disclosure. Therefore, we will not address in this ruling whether the information at issue in *City of Dallas v. Cornyn*, including Issues 1-B and 2-B in the "Fire Operations Lieutenant Oral Assessment," is subject to disclosure.

¹You indicate that a portion of the submitted information constitutes representative samples of information. We assume that 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 that those records contain substantially different types of information than that submitted to this office.

²The style of the pending case is *City of Dallas v. Cornyn*, No. GV001999 (53d Judicial District Court, Travis County, Tex. Aug. 16, 2000).

With respect to the information that we determined could be withheld under section 552.122 in Open Records Letter No. 2000-2829 (2000) and that is not at issue in *City of Dallas v. Cornyn*, we find that the city may rely on Open Records Letter No. 2000-2829 (2000) to withhold the same information in this file as long as the facts and circumstances surrounding the issuance of the previous ruling have not changed. See Open Records Decision No. 673 (2001).

Next, we address your raised exceptions with respect to the portion of the submitted information that is not at issue in *City of Dallas v. Cornyn* and that we have not already ruled on in Open Records Letter No. 2000-2829 (2000). Section 552.103 of the Government Code provides 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.

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).

You point to the current litigation between the city and the Office of the Attorney General as evidence of pending litigation. We agree that you have adequately demonstrated that the city is currently involved in litigation. Under the second prong of the section 552.103 test, you state that the submitted information "concern[s] the subject matter of the litigation, which is two open records requests for information relating to the assessment center conducted in April 2000, for promotions of lieutenant and captain in the Dallas Fire Department." Likewise, you have submitted a statement from the city attorney in charge of the litigation in which the attorney indicates that the requested information relates to the

pending litigation and is therefore excepted under section 552.103. Based on your arguments and our review of the submitted information, we agree that the submitted information at issue in this file relates to pending litigation. Therefore, you may withhold the submitted information at issue under section 552.103.

We note, however, that 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. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed.³ Further, 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).

In summary, we do not reach the issue of whether Issues 1-B and 2-B in the "Fire Operations Lieutenant Oral Assessment" are subject to disclosure. Rather, we leave that determination to the court in *City of Dallas v. Cornyn*. Furthermore, the city may rely on Open Records Letter No. 2000-2829 (2000) to withhold the same information we determined could be withheld in that ruling as long as the facts and circumstances surrounding the issuance of the previous ruling have not changed. The city may withhold the remainder of the submitted information under section 552.103 of the Government Code.

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

³We note that your submission of the information to this office for the purpose of obtaining a decision under section 552.301(e) of the Government Code does not constitute a release to the opposing party for the purpose of section 552.103(a) of the Government Code.

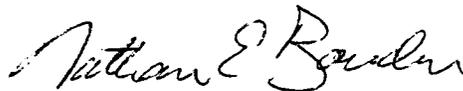
records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these 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 Dept. of Pubic 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,



Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/sdk

Ref: ID# 152682

Enc: Submitted documents

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(w/o enclosures)

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