



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

January 15, 2003

Mr. Gary Grief
Acting Executive Director
Texas Lottery Commission
P.O. Box 16630
Austin, Texas 78761-6630

OR2003-0308

Dear Mr. Grief:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID#174397.

The Texas Lottery Commission (the "commission") received a request for a copy of the public information contained in the commission's files concerning a commission employee. You claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

We first note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under 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 commission must release the completed personnel evaluations in Exhibit B under section 552.022(a)(1), unless these records are excepted from disclosure under section 552.108 or expressly confidential under other law. You do not raise

section 552.108. Section 552.103 is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. As such, this exception is not other law that makes information confidential for the purposes of section 552.022. Therefore, the completed personnel evaluations may not be withheld under section 552.103. *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 No. 542 at 4 (1990) (litigation exception does not implicate third-party rights and may be waived).

We now address your argument under section 552.103 of the Government Code with respect to the remaining information. Section 552.103 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 commission 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 on the date that the governmental body receives the request, 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 commission must meet both prongs of this test for information to be excepted under section 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. Open Records Decision No. 331 (1982). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). Although the commission identifies an individual who has affirmatively stated that he is going to sue the commission and has made numerous telephone calls to the commission regarding an investigation of his business conducted by the commission’s security division, the commission provides no evidence of any objective steps toward litigation taken by this individual. As such, based upon the information provided, we cannot agree that litigation was reasonably anticipated by the commission on the date it received the request.

You also state that there is a pending criminal investigation by the Bastrop County District Attorney’s Office (the “D.A.’s Office). We are aware that the Prosecutor’s Assistance Division of the Office of the Attorney General is assisting the D.A.’s Office in their ongoing investigation. Generally, absent a letter or representation from the D.A.’s Office stating that the information should not be released, the commission will be unable to meet its burden under section 552.103 with regard to information in the custody of the D.A. Open Records Decision Nos. 469 at 2 (1987), 121 (1976) (university may withhold information provided to the D.A.’s Office under section 552.103 if the D.A. determines that the information should not be released). Here, the Assistant Attorney General involved in the ongoing investigation has informed this office that he does not wish to withhold the information. Thus, the commission may not withhold any of the remaining submitted information under section 552.103.

We also note that you appear to have redacted portions of the submitted personnel file prior to submission to our office. It is important that all information be submitted to our office without redaction so that we can make an accurate determination as to its availability to the public. Failure to submit the information properly is a violation of section 552.301 of the Government Code. In those instances where we can determine the type of information that was redacted, we will rule on the public availability of that information. However, when we cannot determine the substance of the information submitted, it is deemed public under section 552.302 of the Government Code and must be released. We have marked the information accordingly.

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).

We note that section 552.117 is applicable to some of the submitted information. Section 552.117(2) of the Government Code excepts from public disclosure information that reveals a peace officer's home address, home telephone number, social security number, and whether the officer has family members. "Peace officer" is defined by article 2.12 of the Code of Criminal Procedure. We have marked the information in the submitted documents that must be withheld pursuant to section 552.117(2).

Lastly, we also note that the submitted information may contain driver's license information that is protected by section 552.130. Section 552.130 provides in relevant part:

(a) Information is excepted from the requirement of Section 552.021 if the information relates to:

(1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]

(2) a motor vehicle title or registration issued by an agency of this state[.]

Gov't Code § 552.130. Therefore, you must withhold the driver's license number we have marked under section 552.130 if it is a Texas driver's license number. If the driver's license number we have marked is not a Texas driver's license number, it must be released. We note here that a licensed peace officer's license number, as distinguished from a Texas driver's license number, is public information in this matter and may not be withheld.

In sum, we have marked the licensed peace officer's license number that must be released, as well as the submitted information that is illegible and deemed public under section 552.302.² We have also marked the information that must be withheld under sections 552.117 and 552.130. The remaining information must be released.

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.

²If you believe that the information we have marked for release under section 552.302 is confidential and may not lawfully be released, you must challenge the ruling in court as outlined above.

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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



Heather Pendleton Ross
Assistant Attorney General
Open Records Division

HPR/sdk

Ref: ID# 174397

Enc: Submitted documents

c: Mr. Gregory Hitt
812 San Antonio Street, Suite 100
Austin, Texas 78702
(w/o enclosures)