



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 11, 2004

Mr. Chris M. Borunda
Ray, Valdez, McChristian & Jeans
5822 Cromo Drive
El Paso, Texas 79912

OR2004-3838

Dear Mr. Borunda:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 201244.

The City of Socorro (the "city"), which you represent, received a request from the city's mayor for a specific audio tape. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted audio tape.

Initially, we note that a member of a governmental body acting in his or her official capacity is not a member of the public for purposes of access to information. Thus, an authorized official may review records of the governmental body without waiving any exceptions to disclosure. *See* Attorney General Opinion JM-119 at 2 (1983). After reviewing the submitted information, we are unable to determine whether the requestor is acting in her official capacity as mayor of the city. If so, then the city's release of any information would not constitute a release to the public and would not waive any exceptions. If the requestor is acting in a private capacity, release by the city would waive its ability to claim any discretionary exceptions under the Act. *See id.*; *see also* Open Records Decision No. 666 at 4 (2000) (municipality's disclosure to a municipally-appointed citizen advisory board does not constitute a release to the public as contemplated under section 552.007 of the Government Code).

Next, we consider your claim that section 552.103 is applicable to the submitted audio tape. Section 552.103(a), the "litigation exception," excepts from disclosure information relating

to litigation to which the state or a political subdivision is or may be a party. 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 section 552.103(a).

The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish *concrete* evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

You have submitted information to this office showing that a city employee has filed a complaint with the Texas Commission on Human Rights (the "TCHR") alleging discrimination and retaliation.¹ The TCHR operates as a federal deferral agency under section 706(c) of title VII, 42 U.S.C. § 2000e-5. The Equal Employment Opportunity Commission ("EEOC") defers jurisdiction to the TCHR over complaints alleging employment discrimination. *Id.*

This office has stated that a pending EEOC complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982). You advise that the TCHR complaint has been tentatively resolved between the city employee and the city. You further advise, however, that the terms of the settlement are subject to approval by the TCHR and that such approval has not yet occurred. Therefore, we find that the complaint with the TCHR is pending. By showing that the complaint filed with the TCHR is pending, you have shown that litigation is reasonably anticipated. You also advise that the complaint was filed by the employee on November 5, 2003. Further, you advise and submit documentation showing that the city received the request for the audio tape on February 20, 2004. Therefore, we also find that the city reasonably anticipated litigation on the date it received the request for the audio tape. Upon review of your arguments, the submitted audio tape and the TCHR complaint you have provided as background information, we find that the city has demonstrated that the audio tape at issue relates to reasonably anticipated litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 483 (Tex. App.--Austin 1997, no pet.) ("Ordinarily, the words

¹You advise, and review of the responsive audio tape substantiates, that the requested audio tape contains a conversation between this city employee and the requestor.

'related to' mean 'pertaining to,' 'associated with' or 'connected with.'"); *see also* Open Records Decision Nos. 551 at 5 (1990) (attorney general will determine whether governmental body has reasonably established that information at issue is related to litigation).

We note, however, that the purpose of the litigation exception is to enable 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). Accordingly, 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. In this case, the audio tape at issue was created by and obtained from the opposing party. Hence, the city may not withhold the audio tape under section 552.103 and it must be released to the requestor.

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 Dep't of Pub. 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,

A handwritten signature in black ink, appearing to read "Cary Grace", with a long horizontal line extending to the right.

Cary Grace
Assistant Attorney General
Open Records Division

ECG/krl

Ref: ID# 201244

Enc. Submitted documents

c: Mayor Irma Sanchez
10835 Patti Jo
Socorro, Texas 79927
(w/o enclosures)