



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 12, 2006

Ms. Laura Garza Jimenez
Nueces County Attorney
Nueces County Courthouse
901 Leopard, Room 207
Corpus Christi, Texas 78401-3680

OR2006-03663

Dear Ms. Jimenez:

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# 246157.

Nueces County (the "county") received a request for information pertaining to Nueces County Attorney's Office employees, specifically 1) information relevant to a non-exhaustive list compiled by the requestor of "acts or omissions of various Nueces County Attorney's Office employees which . . . did not result in any significant discipline," 2) all documents that indicate or reveal that employees missed court-mandated deadlines in Child Protective Services Cases within the past twelve months, and 3) all documents pertaining to the failure of any employee to appear at the December 13, 2005 docket control conference in Cause No. 05-2456-B. You state that you do not have responsive information concerning portions of the request.¹ You contend that the request for information is not a proper request under the Act to which the county is required to respond. In the alternative, you claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.111, and 552.136 of the Government Code. We have considered your arguments and reviewed the submitted information.

As a preliminary matter, you contend that the request at issue was not a valid request under the Act because the request was delivered to the Nueces County Human Resources

¹The Act does not require a governmental body to release information that did not exist when a request for information was received, create responsive information, or obtain information that is not held by or on behalf of the county. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1936).

Department, and only copied to the county. Generally, a request for public information need not be addressed to the officer of public information of a governmental body to be a valid request under the Act. *See* Open Records Decision Nos. 497 at 3 (1988), 44 at 2 (1974); *see also* Gov't Code § 552.202 (each department head of governmental body is an agent of officer for public information for purposes of receiving requests under Act). The Act merely requires a request to be reasonably identifiable as a request for public records. *See* Open Records Decision No. 497. We determine that the request at issue was properly delivered to the county and is a valid request for information under the Act. Thus, we determine that the county is obligated to respond to the request as provided under the Act.

Next, you note that the information contained in Exhibit 8 is the identical information that was the subject of a previous ruling from this office. In Open Records Letter No. 2005-09714 (2005), the county received a request for thirty-six categories of information related to the Nueces County Clerk's receipt of an "original abstract of judgement" and a "subsequent abstract of judgement." We concluded that the county may withhold the information submitted in that instance under section 552.103 of the Government Code. Therefore, assuming that the four criteria for a "previous determination" established by this office in Open Records Decision No. 673 (2001) have been met, we conclude that the county may continue to rely on our decision in Open Records Letter No. 2005-09714 with respect to the information in Exhibit 8.² *See* Gov't Code § 552.301(f); Open Records Decision No. 673.

We now turn to your arguments for the remaining submitted information. We note that Exhibits 4 and 5 contain information filed with the court that is subject to section 552.022 of the Government Code. Section 552.022(a) enumerates categories of information that are public information and not excepted from required disclosure under the Act unless they are expressly confidential under other law. One such category is "information that is also contained in a public court record[.]" Gov't Code § 552.022(a)(17). This information must be released under section 552.022(a)(17), unless the information is expressly confidential under other law.

Although you assert this information is excepted under section 552.103 of the Government Code, this section is a discretionary exception under the Act and is not other law that makes information confidential. *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). Therefore, these court-filed documents may not be withheld under

²The four criteria for this type of "previous determination" are 1) the records or information at issue are precisely the same records or information that were previously submitted to this office pursuant to section 552.301(e)(1)(D) of the Government Code; 2) the governmental body which received the request for the records or information is the same governmental body that previously requested and received a ruling from the attorney general; 3) the attorney general's prior ruling concluded that the precise records or information are or are not excepted from disclosure under the Act; and 4) the law, facts, and circumstances on which the prior attorney general ruling was based have not changed since the issuance of the ruling. *See* Open Records Decision No. 673.

section 552.103 of the Government Code. Since you raise no other exceptions to the release of Exhibits 4 and 5, the county must release the information we have marked under section 552.022(a)(17) of the Government Code.

Next we address your section 552.103 claim with regard to the remaining submitted information. Section 552.103 of the Government Code provides in relevant part 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.

Gov't Code § 552.103(a), (c). The county 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. *Univ. of Tex. Law Sch. v. Tex. 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 county must meet both prongs of this test for information to be excepted under section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* This office has stated that a pending Equal Employment Opportunity Commission ("EEOC") complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

In this instance, you provide documentation showing that prior to the county's receipt of this request for information, the requestor filed a complaint with the EEOC against the county for alleged discrimination and retaliation resulting from his whistle blowing activities. You also provide documentation showing that the requestor has filed a "Presentment of Claims" with the Nueces County Commissioners Court, which is "a condition precedent to filing a lawsuit against any elected county official in their official capacity." Based on your

representations and our review of the submitted documents, we find that the county reasonably anticipated litigation when it received this request for information. We also find that the remaining information relates to the anticipated litigation. Accordingly, we conclude that the county may withhold the remaining submitted information under section 552.103 of the Government Code.

Generally, however, 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 pending litigation is not excepted from disclosure under section 552.103(a), and must be disclosed. We note that the requestor, in his capacity as assistant county attorney, has had access to some of the submitted information. However, such information is not considered to have been obtained by the opposing party to the litigation and may therefore still be withheld under section 552.103. Lastly, we advise 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).

In summary, the county may withhold the information in Exhibit 8 in accordance with our holding in Open Records Letter No. 2005-09714. The county must release the marked information contained in Exhibits 4 and 5 under section 552.022 of the Government Code. Finally, the county may withhold the remaining submitted information under section 552.103 of the Government Code. As our ruling is dispositive, we need not address your remaining arguments against disclosure.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the

Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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,



Shelli Egger
Assistant Attorney General
Open Records Division

SE/er

Ref: ID# 246157

Enc. Submitted documents

c: Mr. Kurt B. Chadwell, Esq.
7130 Everhart Road, Unit 21
Corpus Christi, Texas 78413
(w/o enclosures)