



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 21, 2007

Mr. Jeff Betty
Assistant City Attorney
City of San Angelo
P.O. Box 1751
San Angelo, Texas 76902

OR2007-10833

Dear Mr. Betty:

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# 287144.

The City of San Angelo (the "city") received a request for thirteen categories of information related to the Fairmount Cemetery. You state that information responsive to four of the categories does not exist.¹ You claim that the submitted information is excepted from disclosure under sections 552.102 and 552.103 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

¹We note that the Act does not require a government body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

²Although you also raise sections 552.101, 552.107, 552.111, 552.117, 552.136, and 552.137 of the Government Code, you have not provided any arguments in support of these claims. Thus, the city has waived its claims under sections 552.107 and 552.111. *See Gov't Code* § 552.301(e) (governmental body must provide comments explaining why exceptions raised should apply to information requested); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions in general). Further, the city has not demonstrated that any of the submitted information is confidential for purposes of sections 552.101, 552.117, 552.136, or 552.137. *See Gov't Code* §§ 552.301, .302.

Initially, we note that you have failed to submit information that is responsive to categories 5 and 8 of the request. To the extent this information exists, we assume that it has been released. If such information has not been released, then it must be released at this time. *See* Gov't Code §§ 552.301(a); .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, we note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides in pertinent part:

(a) Without limiting the amount or kind of information that is public information under this chapter, 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:

...

(2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body;

...

(14) administrative staff manuals and instructions to staff that affect a member of the public;

...

(15) information regarded as open to the public under an agency's policies[.]

Gov't Code § 552.022(a)(2), (14), (15). The submitted information includes the names, titles, and dates of employment of city employees which are subject to section 552.022(a)(2), as well as policies and procedures that are subject to section 552.022(a)(14) of the Government Code. The city must release the information subject to section 552.022 unless it is expressly made confidential under other law. *See id.* Section 552.103 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived.³ As such, section 552.103 is not "other law" that makes information confidential for the

³Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *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. 665 at 2 n.5 (2000) (discretionary exceptions generally). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

purposes of section 552.022. Accordingly, the city may not withhold the information that is subject to section 552.022, which we have marked, pursuant to section 552.103.

The submitted information also includes job descriptions, which we have marked. Job descriptions are usually open to the public as part of a job posting, and thus expressly public under section 552.022(a)(15).⁴ If the city regards the submitted job descriptions as open to the public, then the city may withhold this information only to the extent it is made confidential under “other law.” As noted, section 552.103 is not “other law” that makes information confidential for the purposes of section 552.022. Therefore, the job descriptions must be released pursuant to section 552.022(a)(15) if the city regards them as open to the public.

However, you also contend that the employees’ names, titles, and dates of employment are confidential under section 552.102 of the Government Code. Because section 552.102 is “other law” for the purposes of section 552.022, we will address your argument under this section.

Section 552.102 excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref’d n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976) for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101.

In *Industrial Foundation*, the Texas Supreme Court stated that information is excepted from disclosure if it (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of legitimate concern to the public. *Indus. Found.*, 540 S.W.2d at 685. We note that information related to a government employee’s job performance is generally a matter of legitimate public interest. *See, e. g.*, Open Records Decision Nos. 470 at 4 (1987) (job performance does not generally constitute public employee’s private affairs). In this instance the information at issue consists of the names, titles, and dates of employment of city employees. This information is neither highly intimate nor embarrassing. Accordingly, the city may not withhold this information pursuant to section 552.102 of the Government Code.

We will address your section 552.103 argument for the remaining information not subject to section 552.022. Section 552.103 provides in relevant part as follows:

⁴We note that the city’s website lists jobs that are currently available.

(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 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 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. *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 city 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). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* 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. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). In Open Records Decision No. 638 (1996), this office stated that, when a governmental body receives a notice of claim letter, it can meet its burden of showing that litigation is reasonably anticipated by representing that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act (the "TTCA"), Civil Practice & Remedies Code, chapter 101, or an applicable municipal ordinance. If a governmental body does not make this representation, the claim letter is a factor that this office will consider in determining whether a governmental body has established that litigation is reasonably anticipated based on the totality of the circumstances. 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. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You assert that the city reasonably anticipates litigation relating to the subject of the present request. You state and provide documentation showing that, prior to the date you received this request for information, the city received a notice of claim letter relating to the subject of the instant request. You do not affirmatively represent to this office that the claim letter is in compliance with the TTCA. However, after having reviewed the submitted information and your arguments, we conclude, based on the totality of the circumstances, that litigation was reasonably anticipated on the date the city received this request for information. Furthermore, we find that the remaining submitted information is related to the anticipated litigation for purposes of section 552.103 of the Government Code.

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). 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, the city must release the information that we have marked pursuant to section 552.022. The remaining information may be withheld under section 552.103.

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,



Nikki Hopkins
Assistant Attorney General
Open Records Division

NH/mcf

Ref: ID# 287144

Enc. Submitted documents

c: Mr. Brett B. Flagg
17110 North Dallas Parkway, Suite 210
Dallas, Texas 75248
(w/o enclosures)