



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 9, 2008.

Mr. John J. Jordan, Jr.
Denton, Navarro, Rocha, & Bernal
701 East Harrison, Suite 100
Harlingen, Texas 78550

OR2008-00471

Dear Mr. Jordan:

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 #299089.

The City of Pharr (the "city"), which you represent, received a request for any and all personnel action forms, including their attachments, pertaining to any city department heads from August, 2006 through October, 2007. You claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code.¹² We have considered the exception you claim and reviewed the submitted information.

Initially, we note that portions of the submitted information are subject to section 552.022 of the Government Code. Section 552.022(a) provides in part 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:

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

¹Although you initially raised section 552.101 of the Government Code, you have not submitted arguments explaining how this exceptions applies to the submitted information. Therefore, we presume that you have withdrawn this exception. See Gov't Code §§ 552.301, 552.302.

²We note that you have already redacted social security numbers from the submitted information. Section 552.147(b) of the Government Code authorizes a government body to redact a living person's social security number from public release without the necessity of requesting a decision from this office under the Act.

Gov't Code § 552.022(a)(2). The personnel action records you submitted to this office contain name, salary, and title information pertaining to the city's various department heads. We have marked a representative sample of these types of information within the submitted documents. The city must release this information pursuant to section 552.022 unless it is excepted from disclosure under section 552.108 of the Government Code, or is expressly made confidential under other law. *See id.* You claim that this information is subject to section 552.103 of the Government Code. Section 552.103 of the Government Code is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not "other law" that makes information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision No.665 at 2 n.5 (2000) (discretionary exceptions generally). Consequently, the city may not withhold any of the information we have marked under section 552.022(a)(2) pursuant to section 552.103 of the Government Code.

Next, we address your claims for the information not subject to section 552.022(a)(2). You state that this information is excepted from disclosure under section 552.103 of the Government Code. 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.

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 on the date the governmental body received the request, 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 552.103(a).

You state that the requestor is the city's former Finance Director. You state that after the requestor was fired by the city, he filed a complaint with the Texas Workforce Commission and the Equal Employment Opportunity Commission that alleged age discrimination and retaliation by the city. You also provide documentation showing that on September 21, 2007, the requestor's attorney filed a civil suit against the city for wrongful termination under the Whistleblower Act. Accordingly, we find that the city was involved in pending litigation on October 16, 2007, the date the city received the present request for information. You assert that the remaining information is related to the pending litigation because it shows how the requestor's own job compensation compared with that of his fellow department heads, and that this information will be central to the litigation over wrongful termination. Based on your representations and our review, we agree that the remaining information relates to the pending litigation and may be withheld under section 552.103.

However, once the remaining information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, any information that has either been obtained from or provided to all other parties in the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the city must release the information we have marked under section 552.022(a)(2). 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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 challenge 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,



Reg Hargrove
Assistant Attorney General
Open Records Division

RJH/eeg

Ref: ID# 299089

Enc. Submitted documents

c: Mr. Ruben Luna
c/o Mr. John J. Jordan, Jr.
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(w/o enclosures)