



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 10, 2008

Mr. David B. Casas
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

QR2008-04824

Dear Mr. Casas:

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# 306928.

The City of San Antonio (the "city") received three requests from the same requestor for information pertaining to Family and Medical Leave Act ("FMLA") requests, reasonable accommodation requests, and federal funding sources. You claim that the requested information is exempted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.¹ We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we must address the requestor's assertion that the city did not comply with section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten business days of receiving the written request. Pursuant to section 552.301(e), a

¹We assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

governmental body is required to submit to this office within fifteen business days of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. Gov't Code § 552.301(e)(1)(A)-(D). The requestor asserts that the city's February 13th letter is not timely, since she asserts it was sent seventeen working days after the city's receipt of her January 19th letter, which was marked as received on January 23rd. Here, the city's request for ruling, sent pursuant to section 552.301(b), was postmarked February 6, 2008, ten working days after the city's receipt of the requestor's January 19th letter. *See* Gov't Code § 552.308 (a document is timely if it is sent via first class United States mail and bears a post office cancellation mark indicating a time within the procedural requirements of section 552.301). The city's February 13th letter, sent pursuant to section 552.301(e), was postmarked February 13, fifteen working days after the city's receipt of the requestor's January 19th letter. We conclude that the city was timely in its request for a ruling.

Next, we note that you have not submitted information responsive to the request letter dated January 19th, 2008. The information you submitted concerning that letter is a summary of the request and the required man hours it would take to process each part of the request. Accordingly, this ruling does not address the public availability of the information submitted in response to the January 19th request letter and the city is not required to release it in response to this request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W. 2d 266 (Tex. App.—San Antonio 1978, writ dismissed). However, the city has not submitted a copy or a representative sample of the information requested in the January 19th request letter. Pursuant to section 552.301(e) of the Government Code, a governmental body must submit to this office within fifteen business days of receiving an open records request a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See* Gov't Code § 552.301(e)(1)(D). By not submitting a copy or representative sample of the information at issue, the city failed to comply with the procedural requirements mandated by section 552.301. Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the procedural requirements of section 552.301 results in the legal presumption that the requested information is public and must be released unless the governmental body demonstrates a compelling reason to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin, 1990, no writ); Open Records Decision No. 319 (1982). A compelling reason exists when third-party interests are at stake or when information is confidential under other law. Open Records Decision No. 150 (1977). Section 552.103 of the Government Code is discretionary in nature; it serves only to protect a governmental body's interests and may be waived. *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); *see also*

Open Records Decision No. 522 (1989) (discretionary exceptions in general). As such, it does not constitute a compelling reason to withhold information for purposes of section 552.302. Accordingly, to the extent any information responsive to the January 19th request letter existed when the city received the request for information, the city may not withhold it under section 552.103, but instead must release it to the requestor.²

Next, we note that a portion of the information submitted in response to the January 23rd request letter consists of a job posting that has been posted on the city's website. This information, as well as an additional job description that was submitted in response to this request, is subject to disclosure under section 552.022(a) of the Government Code, which provides in pertinent part:

[w]ithout 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:

...

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

Gov't Code § 552.022(a)(15). Although you claim the information at issue is excepted from disclosure under section 552.103 of the Government Code, section 552.103 is a discretionary exception that protects a governmental body's interests and may be waived. *See id.* § 552.007; *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 Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not other law that makes information confidential for purposes of section 552.022. Therefore, the city may not withhold the information that is subject to section 552.022, which we have marked, under section 552.103 of the Government Code. We will address section 552.103 for the submitted information not subject to section 552.022 of the Government Code.

Section 552.103 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

²We note that The Act does not require a governmental body to disclose information that did not exist when the request for information was received. *See Bustamante*, 562 S.W.2d at 266; Open Records Decision No. 452 at 3 (1986).

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.

Id. § 552.103(a), (c). A governmental body 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 was pending or reasonably anticipated on the date that the governmental body received the request for information, 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). A governmental body 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 found 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), 281 at 1 (1981).

In this instance, you state, and provide documentation showing, that the requestor is a city employee who filed a claim of alleged discrimination with the EEOC against the city prior to the date the city received the request for information. You also inform us that the requestor has filed a FMLA complaint and was represented by an attorney during a disciplinary action related to a denial of FMLA leave. Upon review, we determine that the city has established that it reasonably anticipated litigation on the date that it received the request for information. Further, you state, and we agree, that the information at issue pertains to the basis of the employee's EEOC and FMLA claims. Therefore, we determine that the information at issue relates to the anticipated litigation. Accordingly, we conclude that section 552.103 is generally applicable to the information at issue.

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, to the extent any information responsive to the January 19th request letter existed when the city received the request for information, the city must release it to the requestor. The city must release the information we have marked under section 552.022(a)(15) of the Government Code. The city may withhold the remaining submitted information under section 552.103 of the Government Code.

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).

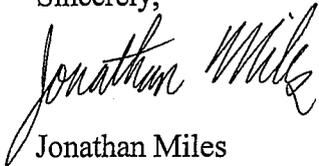
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



Jonathan Miles
Assistant Attorney General
Open Records Division

JM/jh

Ref: ID# 306928

Enc. Submitted documents

c: Ms. Tina Jones-Keels
9806 Trendwood
San Antonio, Texas 78250
(w/o enclosures)