



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 14, 2008

Ms. Lisa Morris  
The Woodlands Fire Department, Inc.  
Community Associations of The Woodlands  
2201 Lake Woodlands Drive  
The Woodlands, Texas 77380

OR2008-06590

Dear Ms. Morris:

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# 310125.

The Woodlands Fire Department (the "department") received a request for information relating to a specific harassment complaint involving the requestor. We understand you to claim that the submitted records constitute judicial records not subject to the Act. You also claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the arguments you make and reviewed the submitted information. 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, you argue that the submitted information should be withheld under rule 12.5(j) and (k) of the Rules of Judicial Administration. Rule 12 of the Rules of Judicial Administration relates to the public disclosure of judicial records, which are not subject to the Act. Rule 12.2 of the Rules of Judicial Administration defines a "judicial record" as "a record made or maintained by or for a court or judicial agency in its regular course of business but not pertaining to its adjudicative function[.]" Tex. R. Jud. Admin. 12.2(d). In this instance, the submitted information consists of personnel records maintained by the department. Because this information was created and is maintained by the department, it does not constitute judicial records subject to the Rules of Judicial Administration. Therefore, the

submitted information is subject to the Act and may only be withheld if it is excepted from disclosure under the Act.

Next, we note that some of the submitted information is subject to section 552.022 of the Government Code, which provides in pertinent part as follows:

(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:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). In this instance, the submitted information contains a separation report. The completed report must be released under section 552.022(a)(1), unless the information is excepted from disclosure under section 552.108 or expressly confidential under other law. We note that section 552.103 of the Government Code is a discretionary exception to disclosure that a governmental body may waive. *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 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the department may not withhold the marked report under section 552.103. However, because some of the submitted information is not subject to section 552.022, we will address section 552.103 for that information.

You claim that the information that is not subject to section 552.022 is protected under section 552.103, which provides in part:

(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). A governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) that the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. 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.* 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"). 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).

For the purposes of section 552.103(a), litigation includes civil lawsuits and criminal prosecutions, as well as proceedings that are governed by the Administrative Procedure Act, chapter 2001 of the Government Code, or are otherwise conducted in a quasi-judicial forum. *See* Open Records Decision Nos. 588 (1991), 474 (1987), 368 (1983), 336 (1982). In this instance, the requestor is the subject of the instant request for information. You assert that the department reasonably anticipates litigation because the requestor has submitted to the department a "Contract Grievance Form," which initiates the formal grievance process pursuant to the contract between the department and the Woodlands Professional Fire Fighter's Association, IAFF Local 3846. You have not informed us, however, that the requestor has actually threatened litigation or otherwise taken any concrete steps toward the initiation of litigation. *See* ORD 331. Further, you have not explained how the grievance process constitutes litigation of a judicial or quasi-judicial nature for purposes of section 552.103. *See generally* Open Records Decision No. 301 (1982) (discussing meaning of "litigation" under predecessor to section 552.103). Consequently, you have not

established that the department reasonably anticipated litigation when it received the request for information. Accordingly, the department may not withhold any of the submitted information under section 552.103 of the Government Code.

We note that section 552.117 of the Government Code may be applicable to some of the submitted information.<sup>1</sup> Section 552.117(a)(1) excepts from disclosure the home address and telephone number, social security number, and family member information of a current or former official or employee of a governmental body who requests that this information be kept confidential under section 552.024. Whether a particular item of information is protected by section 552.117(a)(1) must be determined at the time of the governmental body's receipt of the request for the information. *See* Open Records Decision No. 530 at 5 (1989). Thus, information may only be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date of the governmental body's receipt of the request for the information. Information may not be withheld under section 552.117(a)(1) on behalf of a current or former official or employee who did not timely request under section 552.024 that the information be kept confidential. Thus, the marked telephone number must be withheld under section 552.117(a)(1) if the employee to whom it belongs timely requested confidentiality for her telephone number under section 552.024. The telephone number may not be withheld if the employee did not make a timely request that this information be kept confidential.

Section 552.137 of the Government Code provides that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure. Gov't Code § 552.137(a)-(b). Accordingly, the department must withhold the e-mail addresses we have marked under section 552.137 unless the owners of the e-mail addresses have affirmatively consented to their disclosure.

In summary, the department must withhold the telephone number we have marked under section 552.117 of the Government Code if the employee to whom it belongs timely elected confidentiality for her information under section 552.024. The department must withhold the e-mail addresses we have marked under section 552.137 of the Government Code unless

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<sup>1</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

the owners of the addresses have affirmatively consented to their disclosure. The remaining information must be released to the requestor.<sup>2</sup>

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

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<sup>2</sup>We note that some of the information being released is confidential and not subject to release to the general public. However, the requestor in this instance has a special right of access to the information. Gov't Code § 552.023 (person or person's authorized representative has a special right of access to records that contain information relating to the person that are protected from public disclosure by laws intended to protect that person's privacy interests). Because such information may be confidential with respect to the general public, if the department receives another request for this information from an individual other than this requestor or his authorized representative, the department must again seek a ruling from this office.

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,



Bill Longley  
Assistant Attorney General  
Open Records Division

BL/eeg

Ref: ID# 310125

Enc. Submitted documents

c: Mr. Marc Horvath  
63 West Spindle Tree Circle  
The Woodlands, Texas 77382  
(w/o enclosures)