



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 21, 2008

Ms. Carol Longoria  
The University of Texas System  
Office of General Counsel  
201 West 7<sup>th</sup> Street  
Austin, Texas 78701-2902

OR2008-11541

Dear Ms. Longoria:

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#321046.

The University of Texas System (the "system") received a request for all correspondence regarding the requestor's client for a specified time period.<sup>1</sup> You have stated that you will release a portion of the responsive documents. You claim that the remaining information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, you assert that a portion of the request has been withdrawn by operation of law because the requestor has failed to respond to an itemized cost estimate for copies of responsive documents. *See* Gov't Code § 552.2615. Under section 552.2615, a governmental body is required to provide a requestor with an estimate of charges when a

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<sup>1</sup>We note that the system sought and received a clarification regarding this request. You state that based on the requestor's clarification, responsive documents are limited to those maintained by the Office of the Director of Police and excludes documents the system would seek to protect under the attorney-client privilege. *See* Gov't Code § 552.222(b) (governmental body may communicate with the requestor for purposes of clarifying or narrowing a request for clarification).

<sup>2</sup>We 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.

request to inspect a paper record will result in the imposition of a charge that will exceed forty dollars. *See id.* The relevant portion of section 552.2615 provides:

(a) [T]he governmental body must inform the requestor of the responsibilities imposed on the requestor by this section and of the rights granted by this entire section and give the requestor the information needed to respond, including:

(1) that the requestor must provide the governmental body with a mailing, facsimile transmission, or electronic mail address to receive the itemized statement and that it is the requestor's choice which type of address to provide;

(2) that the request is considered automatically withdrawn if the requestor does not respond in writing to the itemized statement and any updated itemized statement in the time and manner required by this section; and

(3) that the requestor may respond to the statement by delivering the written response to the governmental body by mail, in person, by facsimile transmission if the governmental body is capable of receiving documents transmitted in that manner, or by electronic mail if the governmental body has an electronic mail address.

(b) A request . . . is considered to have been withdrawn by the requestor if the requestor does not respond in writing to the itemized statement by informing the governmental body within 10 days after the date the statement is sent to the requestor that

(1) the requestor will accept the estimated charge;

(2) the requestor is modifying the request in response to the itemized statement; or

(3) the requestor has sent to the attorney general a complaint alleging that the requestor has been overcharged for being provided with a copy of public information.

Gov't Code § 552.2615(a), (b). You state, and provide supporting documentation, that you provided the requestor with an itemized cost estimate for responsive information which you stated you would release. Upon review, we agree that the cost estimate complies with the requirements of section 552.2615. Further, you state that the requestor did not respond to the issued estimate in accordance with section 552.2615. Accordingly, we agree that

section 552.2615(b) is applicable as to the information you stated you would release, and the system need not provide the requestor with this information. We now address your claim against disclosure for the remaining information.

Section 552.103 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 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 receives the request for information, and (2) the information at issue is related to that litigation. See *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex.App.—Austin 2002, no pet.); *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 [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The governmental body must satisfy both prongs of this test for information to be withheld under section 552.103(a). See ORD 551 at 4. For purposes of section 552.103(a), this office considers a contested case under the Texas Administrative Procedure Act ("APA"), Government Code chapter 2001, to constitute "litigation." Open Records Decision No. 588 (1991) at 7 (construing statutory predecessor to the APA).

You inform us that the system's Office of the Director of Police filed a notice of separation pertaining to the requestor's client with the Texas Commission on Law Enforcement Officer Standards and Education ("TCLEOSE") in accordance with section 1701.452(a) of the Texas Occupations Code, following his termination as a University of Texas at Tyler peace officer. You state that TCLEOSE denied the requestor's client's request to correct the record reflecting the discharge. You inform us that a terminated individual may appeal the TCLEOSE decision to the State Office of Administrative Hearings ("SOAH") pursuant to section 1701.452 of the Occupations Code. You state that at the time of the request, the case was pending appeal to SOAH. You further explain that SOAH presides over hearings in

compliance with the APA. You state, and provide supporting documentation, that the system has been implicated in the appeal.

Based on your representations and our review of the information, we agree that litigation was pending when the system received the request for information. In addition, we find that the information at issue is related to the pending litigation for purposes of section 552.103(a). Therefore, the system may generally withhold the information at issue marked under section 552.103 of the Government Code.

We note, however, that the opposing party in the pending litigation has had access to portions of the submitted information. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Thus, if the opposing party has seen or had access to information relating to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, to the extent the opposing party has seen or had access to the information at issue, any such information is not protected by section 552.103 and may not be withheld on that basis. With the exception of such information, the system may withhold the information at issue at this time under section 552.103. We note the applicability of section 552.103 ends when the litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

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). If the governmental body does not file suit over 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,



Christina Alvarado  
Assistant Attorney General  
Open Records Division

CA/jb

Ref: ID#321046

Enc. Submitted documents

c: Christopher D. Livingston  
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(w/o enclosures)