ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 5, 2009

Mr. Christopher Gregg
Gregg & Gregg, PC
16055 Space Center Boulevard, Suite 150
Houston, Texas 77062

OR2009-00053

Dear Mr. Gregg:

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# 331311.

The City of League City (the "city"), which you represent, received a request for all e-mails sent to or from the city mayor concerning internal complaints made by city employees. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code.[1] We have considered the exception you claim and reviewed the submitted information.

Section 552.103 of the Government Code 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.

[1]Although you also appear to assert the attorney-client privilege under section 552.107 of the Government Code, you have submitted no arguments in support of this claim. Therefore, this decision does not address section 552.107. *See* Gov't Code §§ 552.301(e)(1)(A) (governmental body must submit written comments stating reasons why stated exceptions apply), .302.

. . .

> (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 that raises section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated 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. *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."[2] *Id.*

You indicate, and the submitted documents reflect, that prior to the city's receipt of this request for information, the representative of a terminated city employee filed a petition to investigate claims under Texas Rule of Civil Procedure 202.2 against the city. You state the city has filed an objection to this petition. Although you state that the submitted information is "directly relate[d] to the subject matter" of the petition, you do not explain the petitioner's claims. Based on your representations and our review of the submitted information, we find that the city reasonably anticipated litigation on the date of its receipt of this request for information and that the information we have marked is related to the anticipated litigation. We therefore conclude that the information we have marked is excepted from disclosure at this time under section 552.103 of the Government Code. We also find, however, that you have failed to demonstrate how the remaining information is related to the anticipated

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[2]Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), *see* Open Records Decision No. 336 (1982); (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

litigation based on the Texas Rule of Civil Procedure 202.2 petition. Accordingly, none of the remaining information may be withheld under section 552.103 on that basis.

You also claim the remaining submitted information is excepted from disclosure on the basis of other anticipated litigation. You explain that two current city employees have filed internal complaints with the city Human Resources Manager and these two complaints have been turned over to the city's liability risk carrier, the Texas Municipal League (the "TML"), for investigation. You inform us a request has been made for TML to assign an attorney to investigate the complaints and assert that release of the submitted information prior to the conclusion of this investigation would negatively affect the investigation. However, you do not inform us, and the submitted documents do not reflect, that the two current employees have taken any objective steps towards initiating litigation. Therefore, we find that the city has not demonstrated that it reasonably anticipated litigation on the date it received the instant request for information. Accordingly, the city may not withhold any portion of the submitted information under section 552.103 of the Government Code on the basis of anticipated litigation brought by the two current employees.

We note that 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* Open Records Decision No. 551 at 4-5 (1990). If the opposing parties have seen or had access to information relating to anticipated litigation through discovery or otherwise, then there is no interest in withholding the information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We also note that the applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

We note that some of the remaining submitted information consists of personal e-mail addresses that are subject to section 552.137 of the Government Code.[3] Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). We note the requestor has a right of access to her own e-mail address. *Id.* § 552.023 (person or person's authorized representative has special right of access to information relating to person and protected from public disclosure by laws intended to protect that person's privacy interest). The e-mail addresses we have marked are not a type specifically excluded by section 552.137(c). Accordingly, the city must withhold the e-mail addresses we have marked under section 552.137 of the

[3]The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

Government Code, unless the owners of the e-mail addresses have affirmatively consented to their disclosure.

In summary, the city may withhold the information we have marked under section 552.103 of the Government Code. Unless the owners have consented to their release, the city must withhold the e-mail addresses we have marked under section 552.137 of the Government Code. The remaining information must be released.

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).

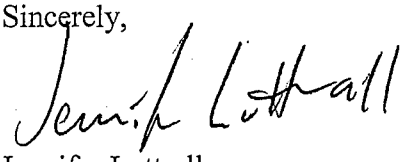
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, upon receiving this ruling, the governmental body will either release the public records 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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/eeg

Ref: ID# 331311

Enc. Submitted documents

c: Requestor
(w/o enclosures)