



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

July 24, 2009

Ms. Victoria Huynh  
Assistant City Attorney III  
City of Plano  
P.O. Box 860358  
Plano, Texas 75086-0358

OR2009-10285

Dear Ms. Huynh:

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# 350938.

The City of Plano (the "city") received a request for portions of a named individual's personnel file. You claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, we note that the submitted information includes a job description, which is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part:

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). In this instance, the submitted information contains a copy of a job description, which is usually open to the public as part of a job posting. If the city regards the submitted job description as open to the public, then the city must release this information unless it is expressly confidential under other law. You claim that the information at issue is excepted from disclosure under section 552.103 of the Government Code. However, section 552.103 is a discretionary exception that protects a governmental body's interests and, thus, is not "other law" for purposes of section 552.022. *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); Open Records Decision Nos. 665 at 2 n. 5 (2000) (discretionary exceptions generally). Accordingly, the job description may not be withheld on the basis of section 552.103. However, we will address your argument under section 552.103 for the remaining information that is not subject to section 552.022.

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 that claims an exception to disclosure under 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, a 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 [1<sup>st</sup> 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).

You state that the city is party to a lawsuit styled *Stephen F. Teiper vs. City of Plano*, Cause No. 4:09-cv-177, filed in the United States District Court for the Eastern District of Texas, Sherman Division that was filed prior to the city's receipt of the request for information. You claim that the submitted information relates to the employment of the plaintiff in the lawsuit and is the subject matter of the lawsuit. Based on your representations and our review, we conclude that section 552.103 is generally applicable to the submitted information.

We note, however, that the opposing party in the pending litigation has seen or had access to the majority of the information at issue. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information