



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

September 23, 2009

Mr. Jason D. King  
Akers & Boulware-Wells, L.L.P.  
Counsel for City of Marfa  
816 Congress Avenue, Suite 1725  
Austin, Texas 78701

OR2009-13439

Dear Mr. King:

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# 356224.

The City of Marfa (the "city"), which you represent, received a request for information related to personnel action against the requestor's client, personnel action against other city employees over a specified date range, communications sent by the city administrator to city employees over a specified date range, and certain city policies, procedures, resolutions, and ordinances. You inform us that the city sought and received clarification of the information requested. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). 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 representative sample of the requested information.<sup>1</sup>

Initially, we note that the submitted information includes several resolutions of the Marfa city council. The submitted resolutions, which we have marked, are analogous to ordinances. Because laws and ordinances are binding on members of the public, they are matters of public record and may not be withheld from disclosure under the Act. *See* Open Records

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<sup>1</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.

Decision No. 221 at 1 (1979) (“official records of the public proceedings of a governmental body are among the most open of records”); *see also* Open Records Decision No. 551 at 2-3 (1990) (laws or ordinances are open records). Accordingly, the city must release the submitted resolutions.

We next consider your arguments under section 552.103 of the Government Code against disclosure of the remainder of the submitted information. Section 552.103 provides in pertinent 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). The city 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, 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.); ORD No. 551 at 4. The city must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* at 4. This office has stated that a pending Equal Employment Opportunity Commission (“EEOC”) complaint indicates that litigation is reasonably anticipated. *See* Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You state, and provide documentation showing, that on June 8, 2009, the requestor filed an EEOC complaint on behalf of his client alleging race, national origin, and retaliation-based discrimination by the city. Based on your representation and our review of the submitted EEOC complaint, we agree that the city reasonably anticipated litigation on the date it

received the present request for information. The submitted EEOC complaint alleges discrimination against the city in its administration of employee pay raises. You generally assert that the submitted documents directly relate or otherwise pertain to the EEOC claim or to personnel actions related to the requestor. Based on your representation and our review, we agree that the remainder of the submitted information relates to litigation anticipated by the city on the date the city received the present request for information.

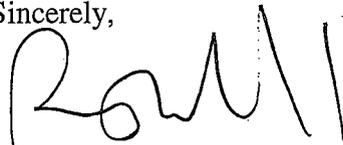
However, if a potential opposing party has, through discovery or otherwise, seen or had access to information that is related to pending litigation, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 at 2 (1982), 320 at 1 (1982). The requestor's client is listed as a recipient on several of the submitted documents, which we have marked. As such, this individual had access to these documents and, therefore, the city may not withhold these documents under section 552.103 of the Government Code. However, because we have no indication that the remaining information at issue has been seen or obtained by the opposing party, the city may withhold these documents, which we marked, under section 552.103.<sup>2</sup>

In summary, the city may withhold the documents we have marked under section 552.103 of the Government Code, but must release the remainder of the submitted information.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Ryan T. Mitchell  
Assistant Attorney General  
Open Records Division

RTM/rl

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<sup>2</sup>We note that the applicability of section 552.103(a) ends once the litigation has concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

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Enc. Submitted documents

cc: Requestor  
(w/o enclosures)