



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 9, 2009

Ms. Amy L. Sims
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City of Lubbock
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OR2009-14313

Dear Ms. Sims and Mr. Craig:

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# 356588.

The City of Lubbock (the "city") received four requests for information from the same requestor pertaining to 1) a named city employee and the requestor's specified attorney-client and attorney work product privileged information and communications pertaining to this information, 2) communications to or from city employees concerning the city's Employee Association, 3) the South Plain Association of Governments appointment of the requestor or another named individual to the first responder advisory board, 4) a specified previous request for a ruling the city submitted to this office, and 5) communications between city employees and KCBD TV.¹ You claim that some of the requested information is not subject

¹The city sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also* Open Records Decision No. 31 (1974) (when presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed).

to the Act. You also claim that some of the submitted information is not responsive to the request. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, 552.111, and 552.137 of the Government Code. You have also notified a third party of the request and of his right to submit arguments to this office as to why the requested information should not be released. Gov't Code § 552.304 (interested party may submit comments stating why the information should or should not be released). We have considered your arguments and reviewed the submitted information.

Initially, you claim that e-mails from specified city officials' personal e-mail accounts are not public information subject to the Act. The Act is only applicable to "public information." *See id.* § 552.021. Section 552.002(a) defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body and the governmental body owns the information or has a right of access to it." *Id.* § 552.002(a). Moreover, section 552.001 of the Act provides that it is the policy of this state that each person is entitled, unless otherwise expressly provided by law, at all times to complete information about the affairs of government and the official acts of public officials and employees. *See id.* § 552.001(a).

We note that the characterization of information as "public information" under the Act is not dependent on whether the requested records are in the possession of an official or employee of a governmental body or whether a governmental body has a particular policy or procedure that establishes a governmental body's access to the information. *See* Open Records Decision No. 635 at 3-4 (1995) (finding that information does not fall outside definition of "public information" in Act merely because individual official or employee of governmental body possesses information rather than governmental body as whole); *see also* Open Records Decision No. 425 (1985) (concluding, among other things, that information sent to individual school trustees' homes was public information because it related to official business of governmental body) (overruled on other grounds by Open Records Decision No. 439 (1986)). Thus, the mere fact that the city does not possess the information at issue does not take the information outside the scope of the Act. *See id.* In Open Records Decision No. 635, this office found that information in a public official's personal appointment calendar may be subject to the Act in certain instances. *See* ORD 635 at 6-8 (stating information maintained on a privately-owned medium and actually used in connection with the transaction of official business would be subject to the Act). We note that the Act's definition of "public information" does not require that an employee or official create the information at the direction of the governmental body. *See* Gov't Code § 552.002. Accordingly, the mere fact that city officials may have generated business-related information using personal resources does not take the information outside the scope of the Act.

The request in this case was for all communications received or forwarded by four specified city officials to KCBD TV employees for a certain time period, including information from personal e-mail accounts. You state that one of the specified city officials does not maintain

a personal e-mail account.² You also state that two of the specified officials were not in the employ of the city during a portion of the specified time period. We agree that any e-mails received or forwarded by those two individuals when they were not city employees or officials would not be subject to the Act. You also state that the officials with personal e-mail accounts have represented that “they do not use their personal e-mail account for [c]ity business, but rather, a [c]ity-controlled account for that purpose.” Thus, because the officials’ personal e-mail accounts are not used to conduct city business, the personal e-mail account records are not “public information” under section 552.002 of the Government Code and need not be released.³

Next, we address your contention that the city does not have any information responsive to the request for the requestor’s “Attorney Client Privilege, Work Product” documents because the information you submitted is not subject to those privileges with respect to the requestor. We note that determining whether the requestor is a privileged party with respect to the submitted information is beyond the scope of this office’s authority in issuing open records rulings. *See id.* § 552.301(a) (division’s authority is limited to determining, upon a governmental body’s request, whether requested information falls within an exception to disclosure). Thus, this ruling does not address whether any information is the requestor’s privileged information. A governmental body must make a good-faith effort to relate a request to any responsive information that is within its possession or control. *See Open Records Decision No. 561 at 8-9 (1990)*. As the city has submitted e-mails from the requestor which contain references to “attorney-client privilege” to our office for review we find these e-mails to be responsive and will consider the city’s arguments against the release of this information.

Next, you inform us that some of the submitted information is the same information that was the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2009-02690 (2009). In Open Records Letter No. 2009-02690, we ruled that the city may withhold certain information under section 552.108(a)(1) of the Government Code on behalf of the Office of the Attorney General’s Criminal Justice Division as a proper custodian of that information. We also ruled the city may withhold other information under section 552.107 of the Government Code. We further ruled, the city must withhold the information we marked under section 552.137 of the Government Code, and release the remaining information. You state that some of the information responsive to this request for information is the same information that was subject to our prior ruling, and you represent that you have no indication that the facts surrounding that ruling have

²The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

³As our determination on this issue is dispositive, we need not address your remaining arguments that the information from the requested personal e-mail accounts is excepted under section 552.101 of the Government Code in conjunction with common-law privacy.

changed. We note that information that has been previously released to the public may not be withheld from a subsequent requestor unless the governmental body is able to demonstrate that the information is confidential by law or that release is prohibited by law. *See* Gov't Code § 552.007. Although you raise section 552.103 of the Government Code for portions of the information that were previously ordered to be released, this section is a discretionary exception that protects a governmental body's interests and may be waived. *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). As such, section 552.103 does not make information confidential or prohibit its release. Further, the city does not raise any additional arguments to withhold the portions of the submitted information that were previously ordered to be released. Thus, with regard to the submitted information that was previously requested and ruled on by this office, we conclude that the city must continue to withhold or release that information in accordance with Open Records Letter No. 2009-02690.⁴ *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). To the extent the submitted information is not encompassed by that prior ruling, we will consider your submitted arguments.

Next, we will address your claim under section 552.103 for the remaining information, because it is potentially the most encompassing exception you claim. Section 552.103 provides as follows:

(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

⁴As our determination is dispositive, we need not address your remaining arguments against the disclosure of the information subject to the previous determination in Open Records Letter No. 2009-02690.

particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, 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.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 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. ORD 452 at 4. 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. See Open Records Decision Nos. 555 (1990), 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). This office has found that a pending Equal Employment Opportunity Commission ("EEOC") complaint indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982), 281 at 1 (1981).

In this instance, you state, and provide documentation showing, that the requestor is an employee of the city who filed a claim of alleged discrimination with the Texas Workforce Commission's Civil Rights Division, a deferral agency for the EEOC, against the city prior to the date the city received the requests for information. Upon review, we determine that the city has established that it reasonably anticipated litigation on the date that it received the requests for information. Further, you explain how the remaining submitted information pertains to the discrimination claim filed by the employee. Based on your representations and our review, we determine that the remaining submitted information relates to the anticipated litigation. Accordingly, the city may withhold the remaining submitted information under section 552.103 of the Government Code.

We note, however, that once the information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We note that it appears that some of the remaining submitted information may have been provided to the other party in the anticipated litigation. Thus, to the extent any of the information at issue has either been obtained from or provided to the other party in the anticipated litigation, it is not excepted from disclosure under section 552.103, and it must be disclosed. We also note that the applicability of

section 552.103 ends when the litigation has concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).⁵

In summary, the named officials' personal e-mail account records are not subject to disclosure under the Act and need not be released to the requestor. With regard to the submitted information that was previously requested and ruled on by this office, we conclude that the city must continue to withhold or release that information in accordance with Open Records Letter No. 2009-02690. The remaining submitted information may be withheld under section 552.103 of the Government Code.

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, 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,



Laura Ream Lemus
Assistant Attorney General
Open Records Division

LRL/jb

Ref: ID# 356588

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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⁵As our ruling is dispositive, we need not address your remaining arguments against disclosure.