



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 22, 2011

Ms. Kathy Davis
City Attorney
City of Killeen
P.O. Box 1329
Killeen, Texas 76540-1329

OR2011-03908

Dear Ms. Davis:

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# 412018 (City ID# W004772-122810).

The City of Killeen (the "city") received two requests from the same requestor for a specified report and the requestor's personnel file, including grievances. You claim 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. We have also received and considered comments submitted by the requestor. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

Initially, we note the submitted information contains the requestor's W-4 form. Prior decisions of this office have held section 6103(a) of title 26 of the United States Code renders tax return information confidential for purposes of section 552.101 of the Government Code.¹ Attorney General Opinion H-1274(1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms). Section 6103(b) defines the term "return information" as "a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments . . . or any other data, received

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987). Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101.

by, recorded by, prepared by, furnished to, or collected by the Secretary [of the Internal Revenue Service] with respect to a return or with respect to the determination of the existence, or possible existence, of liability . . . for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense[.]” See 26 U.S.C. § 6103(b)(2)(A). Federal courts have construed the term “return information” expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer’s liability under title 26 of the United States Code. See *Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), *aff’d in part*, 993 F.2d 1111 (4th Cir. 1993).

Subsections (c) and (e) of section 6103 are exceptions to the confidentiality provisions of section 6103(a) and provide for disclosure of tax information to the taxpayer or the taxpayer’s designee. See 26 U.S.C. § 6103(c), (e)(1)(A)(i) (tax return information may be disclosed to taxpayer), (e)(7) (information may be disclosed to any person authorized by subsection(e) to obtain such information if Secretary of Treasury determines such disclosure would not seriously impair tax administration); see also *Lake v. Rubin*, 162 F.3d 113 (D.C. Cir. 1998) (26 U.S.C. § 6103 represents exclusive statutory route for taxpayer to gain access to own return information and overrides individual’s right of access under the federal Freedom of Information Act). The submitted information contains the requestor’s W-4 form. Accordingly, the city must release the marked W-4 form to the requestor pursuant to section 6103 of title 26 of the United States Code.

Next, we note the submitted information contains completed performance evaluations subject to section 552.022(a)(1) of the Government Code. Section 552.022(a)(1) provides for required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[.]” unless the information is expressly confidential under “other law” or excepted from disclosure under section 552.108 of the Government Code. Gov’t Code § 552.022(a)(1). Although you seek to withhold the submitted evaluations under section 552.103 of the Government Code, this section is a discretionary exception to disclosure that protects a governmental body’s interests and may be waived. See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 439, 475-76 (Tex. App.—Dallas, 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not “other law” that makes information confidential for the purposes of section 552.022. Therefore, the city may not withhold the completed evaluations, which we have marked, under section 552.103. As you have not claimed any other exceptions for the submitted evaluations, they must be released. We will, however, address the city’s argument under section 552.103 for the information not subject to section 552.022.

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.

(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 that it seeks to withhold. 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).*

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. *See id.* This office has found that a pending Equal Employment Opportunity Commission ("EEOC") complaint and a pending complaint filed with the Texas Workforce Commission's Civil Rights Division indicate litigation is reasonably anticipated. *Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).*

You state, and provide documentation showing, that prior to the city's receipt of the instant request, the requestor filed a discrimination claim with the EEOC against the city. Based on your arguments and our review of the remaining information, we find the city reasonably anticipated litigation on the date this request was received. You also state, and we agree, that the remaining information is related to the anticipated litigation for purposes of section 552.103. Therefore, we find section 552.103 is generally applicable to the remaining information.

However, the city seeks to withhold information that the requestor, as opposing party to the anticipated litigation, has already seen or had access to. Once an opposing party in the anticipated litigation has seen or had access to information that is related to litigation, there is no interest in withholding such information from public disclosure under section 552.103. *See Open Records Decision Nos. 349 (1982), 320 (1982).* Thus, the information the

opposing party in the anticipated litigation has seen or had access to is not excepted from disclosure under section 552.103(a). The requestor, who is the opposing party in the EEOC complaint, has already seen or had access to portions of the information at issue. Therefore, this information may not be withheld under section 552.103. However, because we have no indication the remaining information at issue has been seen or obtained by the opposing party, the city may withhold this information, which we have marked, under section 552.103. We note that the applicability of section 552.103(a) ends when the litigation is concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

In summary, the city must release the requestor's W-4 form, which we have marked, pursuant to section 6103 of title 26 of the United States Code. The city must also release the completed performance evaluations pursuant to section 552.022(a)(1) of the Government Code. The city may withhold the information we have marked under section 552.103 of the Government Code. The remaining submitted information must be released.²

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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/eeg

²We note the requestor has a special right of access to some of the information being released in this instance. See Gov't Code § 552.023(b) (governmental body may not deny access to person to whom information relates or person's agent on ground that information is considered confidential by privacy principles); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). Because such information may be confidential with respect to the general public, if the city receives another request for this information from another individual, it should again seek a ruling from this office. See Gov't Code §§ 552.301, .302.

Ref: ID# 412018

Enc. Submitted documents

cc: Requestor
(w/o enclosures)