



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 12, 2011

Ms. Marivi Gambini
Paralegal
City of Irving
825 West Irving Boulevard
Irving, Texas 75060

OR2011-06635

Dear Ms. Gambini:

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# 417327.

The City of Irving (the "city") received a request for the following six categories of information: (1) electronic communications between several named employees during a specified period; (2) documents pertaining to investigations of damaged registers or meters in 2011; (3) documents regarding issues posed to a named employee by the requestor regarding another named employee in 2011; (4) disciplinary records concerning or filed by the requestor; (5) personnel files of the requestor, several named employees, and all customer service representatives; and (6) time records of utility billing personnel during a specified period.¹ You state the city is releasing some information to the requestor. You claim the remaining responsive information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code.² We have considered the exceptions you claim and reviewed the submitted information.

¹You state, and provide documentation reflecting, that the city sought and received clarification from the requestor regarding the parts of the request seeking personnel files and communications. See Gov't Code § 552.222(b) (stating if information requested is unclear to governmental body or if large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used); see also *City of Dallas v. Abbott*, 304 S.W.3d 380, 384 (Tex. 2010) (where governmental body seeks clarification or narrowing of request for information, ten-day period to request attorney general opinion is measured from the date request is clarified or narrowed).

²Although you also raise the attorney-client privilege under Texas Rule of Evidence 503 and the attorney work product and deliberative process privileges under Texas Rule of Civil Procedure 192.5, because the information for which you claim these privileges is not encompassed by section 552.022 of the Government Code, we do not address rule 503 or rule 192.5.

Initially, we note a portion of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). In this instance, Exhibit G consists of an investigation completed by the city. We find this information, which we have marked, is a completed investigation subject to section 552.022(a)(1) of the Government Code. Information subject to section 552.022(a)(1) must be released unless it is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under "other law." Although you claim Exhibit G is excepted under section 552.103 of the Government Code, this is a discretionary exception that protects a governmental body's interest 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.); Open Records Decision No. 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential); *see also* 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 purposes of section 552.022. Therefore, the city may not withhold the completed investigation under section 552.103 of the Government Code. You also claim Exhibit G is excepted by section 552.101 of the Government Code in conjunction with the common-law informer's privilege, which is "other law" that makes information confidential for purposes of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001); *Tex. Comm'n on Env'tl. Quality v. Abbott*, No. GN-204227 (126th Dist. Ct., Travis County, Tex.). Therefore, we next consider your assertion of the informer's privilege for the information in Exhibit G.

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information protected by the common-law informer's privilege, which has long been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). The informer's privilege protects from disclosure the identities of persons who report activities over which the governmental body has criminal or quasi-criminal law-enforcement authority. Open Records Decision No. 515 at 3 (1988). The informer's privilege protects the identities of individuals who report violations of statutes to the police or similar law-enforcement agencies, as well as those who report violations of statutes with civil or criminal penalties to "administrative officials having a duty of inspection or of law enforcement within their particular spheres." Open Records Decision No. 279 at 2 (1981) (citing 8 John H. Wigmore, *Evidence in Trials at Common Law*, § 2374,

at 767 (J. McNaughton rev. ed. 1961)). The report must be of a violation of a criminal or civil statute. *See* Open Records Decision Nos. 582 at 2 (1990), 515 at 4-5 (1988). However, individuals who provide information in the course of an investigation but do not make the initial report of the violation are not informants for the purposes of claiming the informer's privilege. The privilege excepts the informer's statement only to the extent necessary to protect that informer's identity. Open Records Decision No. 549 at 5 (1990).

The investigation in Exhibit G reflects it was instigated following a city employee's suspension for alleged violations of city policy. You claim Exhibit G contains the identities of city employees who came forward and participated in that investigation, which recommended a change in city policy. However, as noted above, the informer's privilege does not protect individuals who merely provide information in the course of an investigation, and you do not identify any individual who initially reported any violation of law. Further, you fail to inform this office of any specific criminal or civil statute the city believes to have been violated. We therefore conclude the city has failed to demonstrate the applicability of the common-law informer's privilege to the information in Exhibit G. Thus, the city may not withhold any of the information at issue under section 552.101 of the Government Code in conjunction with the informer's privilege. As you raise no other exceptions for Exhibit G, this information must be released.

We next turn to your argument under section 552.103 of the Government Code for the information 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). 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 on the date the university 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.); ORD 551

at 4. The city must meet both prongs of this test for information to be excepted under section 552.103(a).

The question of 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 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." *Id.* This office has stated that a pending complaint with the Equal Employment Opportunity Commission (the "EEOC") indicates litigation is reasonably anticipated. Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982).

You state, and provide documentation showing, the requestor filed a complaint against the city alleging discrimination based on race. The submitted information reflects this complaint was pending on the date the request was received by the city. *See City of Dallas*, 304 S.W.3d at 384. Based on your representations and our review of the submitted EEOC complaint, we agree the city reasonably anticipated litigation on the date it received the present request for information. Additionally, upon review of the information at issue and your arguments, we find the city has established that the remaining information is related to the EEOC complaint for purposes of section 552.103. Thus, we agree the city may withhold Exhibits D, E, and F under section 552.103 of the Government Code. As our ruling is dispositive, we need not address your remaining raised exceptions to disclosure.

We note, however, once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, any information at issue that has either been obtained from or provided to all opposing parties in the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the city may withhold Exhibits D, E, and F under section 552.103 of the Government Code. The city must release Exhibit G pursuant to section 552.022(a)(1) 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,

A handwritten signature in black ink, appearing to read 'Bob Davis', written in a cursive style.

Bob Davis
Assistant Attorney General
Open Records Division

RSD/em

Ref: ID# 417327

Enc. Submitted documents

c: Requestor
(w/o enclosures)