



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 28, 2013

Ms. Rebecca Hendricks Brewer
Abernathy, Roeder, Boyd & Joplin, P.C.
P.O. Box 1210
McKinney, Texas 75070-1210

OR2013-01549

Dear Ms. Brewer:

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# 477219 (Town PIR No. 2012-170).

The Town of Prosper (the "town"), which you represent, received a request for information from the employment files of three named individuals during specified periods of time. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.115, 552.117, 552.119, 552.130, and 552.147 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note you have marked some of the submitted information as non-responsive to the request for information. This ruling does not address the public availability of any information that is not responsive to the request, and the town is not required to release any non-responsive information in response to this request.

Next, we note a portion of the submitted information appears to have been the subject of a previous request for information, in response to which this office issued Open Records Letter No. 2012-04551(2012). In Open Records Letter 2012-04551 we determined the town must withhold certain information: (1) under section 552.101 of the Government Code in conjunction with section 1324a of title 8 of the United States Code; (2) under section 552.101 of the Government Code in conjunction with section 6103(a) of title 26 of the United States Code; and (3) under sections 552.102, 552.117(a)(1), 552.130, and 552.137

of the Government Code. We also determined the town must release the remaining information at issue. You now raise section 552.103 of the Government Code for the submitted responsive information. Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential by law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly, pursuant to section 552.007, the town may not now withhold any previously released information unless its release is expressly prohibited by law or the information is confidential by law. Although you raise section 552.103, this section does not prohibit the release of information or make information confidential. *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 Gov't Code § 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Accordingly, to the extent any portion of the submitted information was released in accordance with Open Records Letter No. 2012-04451, the town may not now withhold such information under section 552.103. As we have no indication the law, facts, and circumstances on which Open Records Letter No. 2012-04551 was based have changed, the town must continue to rely on that ruling as a previous determination and withhold or release any identical responsive information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, 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 responsive information is not identical to information that was subject to Open Records Letter No. 2012-04551, we will consider your arguments under sections 552.101, 552.103, 552.115, 552.117, 552.119, 552.130, and 552.147 of the Government Code.

We note portions of the responsive information are subject to section 552.022 of the Government Code. This section provides, in pertinent part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or 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). The responsive information contains completed evaluations that are subject to subsection 552.022(a)(1). The town must release the completed evaluations pursuant to subsection 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or are made confidential under the Act or other law. *See id.* § 552.022(a)(1). You raise section 552.103 of the Government Code for this information.. As noted above, section 552.103 is a discretionary exception to disclosure and does not make information confidential under the Act. *See id.* § 552.007; Open Records Decision Nos. 665 at 2 n.5, 663. Therefore, none of the information subject to section 552.022(a)(1), which we have marked, may be withheld under section 552.103 of the Government Code. Additionally, although sections 552.101, 552.102, 552.115, 552.117, 552.119, and 552.130 of the Government Code make information confidential under the Act, upon review, none of the information subject to section 552.022 contains information excepted by these exceptions. Accordingly, the town must release the marked evaluations pursuant to section 552.022(a)(1) of the Government Code.

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 the governmental body received 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, 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.). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a). *See Open Records Decision No. 551 at 4 (1990).*

To establish 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.” *See* Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim 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 No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, or when an individual threatened to sue on several occasions and hired an attorney. *See* Open Records Decision Nos. 346 (1982), 288 (1981). On the other hand, this office has determined 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). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

You state, and provide documentation showing, prior to the town’s receipt of the request for information, an attorney representing one of the individuals named in the request made a demand for damages related to his client’s alleged wrongful termination. The letter further states should the town not want to engage in settlement discussions, the attorney will have no choice but to file suit and the letter contains a draft petition. Based on our review, we agree the town anticipated litigation prior to the date it received the request for information. We also find the information at issue is related to the anticipated litigation for purposes of section 552.103(a). Therefore, the town may withhold the remaining responsive information under section 552.103 of the Government Code.¹

Generally, however, once information has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to 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 been concluded or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the town must continue to rely on Open Records Letter No. 2012-04551 as a previous determination and withhold or release any identical responsive information in accordance with that ruling. The town must release the marked evaluations pursuant to

¹As our ruling is dispositive, we need not address your remaining arguments against disclosure.

section 552.022(a)(1) of the Government Code. The town may withhold the remaining responsive information 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,



Paige Lay
Assistant Attorney General
Open Records Division

PL/tch

Ref: ID# 477219

Enc. Submitted documents

cc: Requestor
(w/o enclosures)