



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

August 5, 2013

Mr. Gary B. Lawson  
Strasburger & Price, L.L.P.  
901 Main Street, Suite 4400  
Dallas, Texas 75202-3794

OR2013-13461

Dear Mr. Lawson:

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# 496454.

The Dallas Police and Fire Pension System (the "system"), which you represent, received a request for all e-mails exchanged, during a specified time period, between a named individual and any employee, official, or marketing firms contacted by a named entity in the course of performing services for the system. You indicate the system has released some information to the requestor. You claim some of the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.104, 552.105, 552.107, 552.110, 552.111, 552.136, and 552.143 of the Government Code, and privileged under Texas Rules of Civil Procedure 192.3 and 192.5 and Texas Rule of Evidence 503.<sup>1</sup> We have considered your arguments and reviewed the submitted information.

You argue some of the submitted information is excepted from public disclosure under section 552.101 of the Government Code<sup>2</sup> in conjunction with Texas Rules of Civil

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<sup>1</sup>Although it appears you raise section 552.022 of the Government Code, that provision is not an exception to disclosure. Rather, section 552.022 enumerates categories of information that are not excepted from disclosure unless they are expressly confidential under other law. *See* Gov't Code § 552.022.

<sup>2</sup>Section 552.101 excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101.

Procedure 192.3 and 192.5 and Texas Rule of Evidence 503.<sup>3</sup> We note that this office generally does not address discovery and evidentiary rules that may or may not be applicable to information submitted to our office by a governmental body. *See* Open Records Decision No. 416 (1984) (finding that even if evidentiary rule specified that certain information may not be publicly released during trial, it would have no effect on disclosability under Act). However, the Texas Supreme Court has ruled that the Texas Rules of Civil Procedure and the Texas Rules of Evidence are “other law” that make information confidential for the purposes of section 552.022. *See* Gov’t Code § 552.022 (enumerating several categories of information not excepted from required disclosure unless expressly confidential under the Act or other law); *see also In re City of Georgetown*, 53S.W.3d 328 (Tex. 2001). In this instance, the information at issue does not fall into one of the categories of information made expressly public by section 552.022 of the Government Code. Therefore, the Texas Rules of Civil Procedure and Texas Rules of Evidence are not applicable. We also note that section 552.101 does not encompass civil discovery privileges. *See* Open Records Decision No. 647 at 2 (1996). Accordingly, we conclude the system may not withhold any portion of the information at issue pursuant to section 552.101 of the Government Code in conjunction with the Texas Rules of Civil Procedure or the Texas Rules of Evidence.

Section 552.103 of the Government Code provides, in relevant part, 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 section 552.103(a) is applicable in a 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. *See Univ. of Tex. Law Sch. v. Tex.*

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<sup>3</sup>We note the proper exceptions to raise when asserting the attorney-client privilege and work product privilege for information not subject to section 552.022 of the Government Code are sections 552.107 and 552.111 of the Government Code, respectively. *See* Open Records Decision Nos. 676 at 1-2 (2002), 677 (2002).

*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). See ORD 551.

To establish that 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.” See Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. See *id.* 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.<sup>4</sup> Open Records Decision No. 555 (1990); see Open Records Decision No. 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). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You contend the system reasonably anticipates litigation because it is currently in a dispute with the Nasher Sculpture Center (the “Nasher”). You explain the Nasher has made allegations that glare emanating from the glass walls of the Museum Tower, a high-rise residential condominium owned by the system, is damaging the Nasher’s art and vegetation and creating an unpleasant experience for visitors. You state representatives of Museum Tower and the Nasher recently participated in mediation efforts which were unsuccessful. You indicate all efforts short of litigation to resolve the dispute have failed and state the system anticipates being a party to any suit regarding Museum Tower, and you argue there would be legal and financial recourse against the system as a result of any suit. Based on your representations and our review, we determine the system has established it reasonably anticipated litigation on the date it received the request for information. You claim the information you have indicated is related to the anticipated litigation. Upon review, we agree the information at issue is related to the anticipated litigation. Accordingly, the system may withhold the information you have indicated under section 552.103 of the Government Code.<sup>5</sup>

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<sup>4</sup>In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, see Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, see Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, see Open Records Decision No. 288 (1981).

<sup>5</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure of this information.

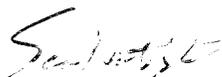
We note once information has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Further, the applicability of section 552.103(a) ends once the litigation has 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 system may withhold the information you have indicated under section 552.103 of the Government Code. The system must release the remaining 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.texasattorneygeneral.gov/open/orl\\_ruling\\_info.shtml](http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Sean Nottingham  
Assistant Attorney General  
Open Records Division

SN/tch

Ref: ID# 496454

Enc. Submitted documents

c: Requestor  
(w/o enclosures)