



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 13, 2014

Mr. Charles H. Weir
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR2014-00752

Dear Mr. Weir:

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# 510835 (City of San Antonio File Nos. W019372 and W019373).

The City of San Antonio (the "city") received two requests from the same requestor for (1) the investigative file that supports a particular disciplinary action; (2) e-mails discussing that disciplinary action; (3) policies, rules, and laws used to make the determination to issue the discipline; (4) a certain Emergency Medical Services ("EMS") patient care report; (5) certain EMS dispatch records; (6) certain metadata and timestamp records; (7) certain PCR penpad service, maintenance, and calibration records; and (8) certain training and certification records. You state you will release information responsive to category three of the request, and the majority of information responsive to category one of the request. You state the city does not have information responsive to categories six, seven, and eight of the request.¹ You claim the remaining requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

¹The 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).

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. This exception encompasses information other statutes make confidential, such as section 773.091 of the Health and Safety Code, which provides in relevant part:

(b) Records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

...

(g) The privilege of confidentiality under this section does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services.

Health & Safety Code § 773.091(b), (g). Except for the information specified in section 773.091(g), EMS records are deemed confidential under section 773.091 and may only be released in accordance with chapter 773 of the Health and Safety Code. *See id.* §§ 773.091-.094. Upon review, we find Exhibit 5 consists of an EMS record subject to chapter 773. Thus, with the exception of the information subject to section 773.091(g), Exhibit 5 must be withheld under section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code. However, we find you have failed to demonstrate how the information in Exhibit 11 constitutes a record of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider. Thus, the information in Exhibit 11 may not be withheld under section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code. As you raise no other arguments for Exhibit 11, it must be released.

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 claiming section 552.103 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 governmental body received the request, 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). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

This office has long held that, for purposes of section 552.103, "litigation" includes contested cases conducted in a quasi-judicial forum. *See, e.g.*, Open Records Decision Nos. 474 (1987), 368 (1983), 336 (1982), 301 (1982). Likewise, contested cases conducted under the Texas Administrative Procedure Act, chapter 2001 of the Government Code, constitute "litigation" for purposes of section 552.103. *See* Open Records Decision Nos. 588 (1991) (concerning former State Board of Insurance proceeding), 301 (concerning hearing before Public Utilities Commission). In determining whether an administrative proceeding is conducted in a quasi-judicial forum, some of the factors this office considers are whether the administrative proceeding provides for discovery, evidence to be heard, factual questions to be resolved, the making of a record, and whether the proceeding is an adjudicative forum of first jurisdiction with appellate review of the resulting decision without a re-adjudication of fact questions. *See* ORD 588.

You state, and provide documentation showing, the firefighters whose information is at issue each filed an appeal challenging the city's decision to suspend them prior to the city's receipt of the instant request. We understand the appeal will be conducted by a third party hearing examiner in a binding arbitration proceeding authorized under chapter 143 of the Local Government Code. *See* Local Gov't Code § 143.057. We further understand the arbitration will be governed by the Labor Rules of the American Arbitration Association (the "AAA"). We note that under the AAA's Labor Rules, the parties may be represented by counsel, witnesses may be required to testify under oath, an arbitrator authorized by law to subpoena witnesses and documents may do so, and the arbitrator is the judge of the relevance and materiality of the evidence. Thus, we understand you to assert that this proceeding constitutes litigation of judicial or quasi-judicial nature for purposes of section 552.103. *See generally* ORD 301 (discussing meaning of "litigation" under predecessor to section 552.103). Based on your representations and our review of the submitted information, we find the city was a party to pending litigation on the date it received the

request for information. Further, you state the information at issue relates to the pending litigation. Accordingly, we conclude the city may withhold the information marked as Exhibit 6 pursuant to section 552.103 of the Government Code.

However, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103 interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the pending litigation is not excepted from disclosure under section 552.103, and it must be disclosed. We also note the applicability of section 552.103 ends once the litigation has been concluded.

In summary, with the exception of the information subject to section 773.091(g), the city must withhold Exhibit 5 under section 552.101 of the Government Code in conjunction with section 773.091 of the Health and Safety Code. The city may withhold Exhibit 6 under section 552.103 of the Government Code. The remaining information must be released.

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, 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,



Alia K. Plasencia-Bishop
Assistant Attorney General
Open Records Division

AKPB/tch

Ref: ID# 510835

Enc. Submitted documents

c: Requestor
(w/o enclosures)