



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 23, 2014

Mr. Ray Rodriguez
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR2014-08913

Dear Mr. Rodriguez:

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# 523743 (COSA File No W025067-030414).

The City of San Antonio (the "city") received a request for information pertaining to the maintenance and upkeep of specified escalators and information pertaining to a specified incident. You claim the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.¹

Initially, we note some of the submitted information may have been the subject of previous requests for information, as a result of which this office issued Open Records Letter Nos. 2013-13672 (2013), 2013-14887 (2013), 2013-15506 (2013), and 2013-16144 (2013). In Open Records Letter No. 2013-13672, we determined: with the exception of certain completed reports subject to section 552.022(a)(1) of the Government Code, the city may

¹We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

withhold the remaining information at issue under section 552.103 of the Government Code. In Open Records Letter No. 2013-14887, we determined: the city must continue to rely upon Open Records Letter No. 2013-13672 as a previous determination and withhold or release the previously ruled upon information in accordance with that ruling; except for the information subject to section 552.022(a)(1) of the Government Code, the city may withhold the remaining information under section 552.103 of the Government Code; to the extent the individuals at issue timely elected confidentiality under section 552.024 of the Government Code and a governmental body does not pay for the cellular telephone service, the city must withhold certain information under section 552.117 of the Government Code; the city must withhold the personal e-mail addresses we marked under section 552.137 of the Government Code, unless the owners affirmatively consent to their public disclosure; and the city must release the remaining information at issue. In Open Records Letter No. 2013-15506, we determined the city must continue to rely upon Open Records Letter Nos. 2013-13672 and 2013-14887 as previous determinations and withhold or release the previously ruled upon information in accordance with those rulings; the city must release certain completed reports pursuant to section 552.022(a)(1) of the Government Code; and the city may withhold the remaining information at issue under section 552.103 of the Government Code. In Open Records Ruling No. 2013-16144, we determined the city must continue to rely upon Open Records Letter No. 2013-13672 as a previous determination and withhold or release the previously ruled upon information in accordance with that ruling; and the city may withhold the remaining information under section 552.103 of the Government Code. You now seek to withhold portions of the submitted information under section 552.103 of the Government Code. Section 552.007 of the Government Code provides that, 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 under 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 city may not now withhold any previously released information unless its release is expressly prohibited by law or the information is confidential under law. Although you raise section 552.103 of the Government Code, 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 section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Thus, the city may not now withhold any of the previously released information under section 552.103 of the Government Code. We have no indication there has been any change in the law, facts, or circumstances on which the previous rulings were based. Accordingly, to the extent the submitted information is identical to the information previously requested and ruled upon by this office, we conclude the city must continue to rely on Open Records Letter Nos. 2013-13672, 2013-14887, 2013-15506, and 2013-16144 as

previous determinations and withhold or release the identical information in accordance with those rulings. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and 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 submitted information is not encompassed by the prior rulings, we will address your argument against disclosure.

Next, we note some of the responsive information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he 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;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1), (a)(3). The submitted information contains a completed report made by the city that is subject to subsection 552.022(a)(1) and executed contracts involving the receipt or expenditure of city funds that are subject to subsection 552.022(a)(3). The city must release the completed report pursuant to subsection 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or is made confidential under the Act or other law. *See id.* The city must release the completed contracts pursuant to subsection 552.022(a)(3) unless they are made confidential under the Act or other law. *See id.* You seek to withhold the information subject to section 552.022 under section 552.103 of the Government Code. However, section 552.103 is a discretionary exception and does not make information confidential under the Act. *See Dallas Area Rapid Transit*, 4 S.W.3d at 475-76; *see also* ORDs 665 at 2 n.5, 663 at 5. Therefore, the completed report and completed contracts subject to section 552.022, which we have marked, may not be withheld under section 552.103 of the Government Code. As you raise no other exceptions, the marked completed report and completed contracts must be released pursuant to section 552.022 of the Government Code.

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. 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 litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing 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). In Open Records Decision No. 638 (1996), this office stated a governmental body has met its burden of showing litigation is reasonably anticipated when it received a notice of claim letter and the governmental body represents the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act ("TTCA"), Civ. Prac. & Rem. Code, ch. 101. If that representation is not made, the receipt of the claim letter is a factor we will consider in determining, from the totality of the circumstances presented,

whether the governmental body has established litigation is reasonably anticipated. *See* ORD 638 at 4.

You explain an incident occurred at a city-owned building which resulted in injuries to multiple individuals. You state, at the time of the request, the city reasonably anticipated the incident would result in claims being made against the city which would most likely result in litigation. You inform us, and submit supporting documentation showing, that prior to receiving the present request for information, the city received correspondence from numerous attorneys representing individuals injured in the incident that alleges negligence on the part of the city and requests preservation of information related to the incident. You do not state these letters meet the requirements of the TTCA. However, we note one of the letters at issue concerns injuries sustained by the attorney's client and states, "unless immediate efforts can be made to settle this claim, [the attorney's client] intends to file suit pursuant to the Texas Tort Claims Act for his injuries and all applicable damages." Based upon these representations, our review, and the totality of circumstances, we conclude the city reasonably anticipated litigation at the time the city received the present request. We also agree the information at issue is related to the anticipated litigation for the purposes of section 552.103. Accordingly, we conclude the city may withhold the remaining information under section 552.103 of the Government Code.

Generally, however, once information has been obtained by all parties to the 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 pending or 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 anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, to the extent the submitted information is identical to the information previously requested and ruled upon by this office, the city must continue to rely on Open Records Letter Nos. 2013-13672, 2013-14887, 2013-15506, and 2013-16144 as previous determinations and withhold or release the identical information in accordance with those rulings. The marked completed report and completed contracts must be released pursuant to section 552.022 of the Government Code. The city may withhold the remaining 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.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,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/akg

Ref: ID# 523743

Enc. Submitted documents

c: Requestor
(w/o enclosures)