



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

October 31, 2014

Mr. C. Robert Heath  
Counsel for the City of McAllen  
Bickerstaff, Heath, Delgado, Acosta, L.L.P.  
3711 South MoPac Expressway, Building One, Suite 300  
Austin, Texas 78746

OR2014-19785

Dear Mr. Heath:

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# 542073.

The City of McAllen (the "city"), which you represent, received a request for five categories of information, including 1) personnel action forms related to three named individuals; 2) the personnel file for a named individual; 3) all text messages sent or received from city-issued cellular telephones belonging to nine specified individuals over a specified time period; 4) all e-mail communications from nine specified individuals over a specified time period; and 5) all charges of discrimination filed by a named individual.<sup>1</sup> You state you do not have information responsive to the third category of the request.<sup>2</sup> You claim the responsive information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.107,

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<sup>1</sup>You state the city sought and received clarification of a portion of the information requested. *See* Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S. W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

<sup>2</sup>We note the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note in a letter dated October 1, 2014, the city states it wishes to withdraw its request for an open records decision with regard to information responsive to categories one, two, and five above because the city has provided information responsive to these categories to the requestor. Thus, as the city no longer seeks to withhold information responsive to categories one, two, and five of the request from the requestor, this ruling does not address the public availability of this information, which we have marked.

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). The governmental body has the burden of providing relevant facts and documents to show 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 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, orig. proceeding); *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 from disclosure under section 552.103(a).

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate litigation is reasonably anticipated, the governmental body must furnish concrete evidence litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* This office has found a pending complaint with the Equal Employment Opportunity Commission ("EEOC") indicates litigation is reasonably anticipated. *See* Open Records Decision Nos. 386 at 2 (1983), 336 at 1 (1982), 281 at 1 (1981).

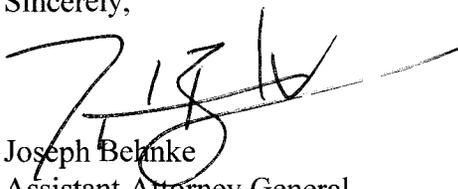
You state, prior to the city's receipt of the request for the information at issue, the city received a letter from counsel for a named individual that contained a specific threat to sue and a threat that the individual will file a complaint with the EEOC. Based on these representations and our review of the submitted documents, we find the city has demonstrated the city reasonably anticipated litigation when it received the request for information at issue. We also find the city has established the information at issue is related to the anticipated litigation for purposes of section 552.103(a). Therefore, the city may withhold the information we have marked under section 552.103(a) of the Government Code.<sup>3</sup>

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 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).

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,



Joseph Belinke  
Assistant Attorney General  
Open Records Division

JB/som

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<sup>3</sup>As our ruling is dispositive, we need not address the city's remaining arguments against disclosure.

Ref: ID# 542073

Enc. Submitted documents

c: Requestor  
(w/o enclosures)