



KEN PAXTON  
ATTORNEY GENERAL OF TEXAS

June 22, 2017

Mr. Jaime Tijerina  
Deputy City Attorney  
City of Mission  
1201 East 8th Street  
Mission, Texas 78572

OR2017-13956

Dear Mr. Tijerina:

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# 662675 (Mission File No. 17-0205).

The City of Mission (the "city") received a request for information pertaining to the requestor's client; specified policies; and the personnel files of specified city employees. You state the city does not have information responsive to portions of the request.<sup>1</sup> You state the city is releasing some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup>

Initially, we note portions of the submitted information are subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

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<sup>1</sup>We note the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984).

<sup>2</sup>We 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.

(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; [and]

...

(15) information regarded as open to the public under an agency's policies[.]

Gov't Code § 552.022(a)(1), (15). Some of the submitted information, which we have marked, consists of a completed evaluation or is part of a completed investigation and is subject to section 552.022(a)(1). The city must release this information pursuant to section 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.* § 552.022(a)(1). Further, some of the submitted information consists of job descriptions. We note a job description is generally open to the public as part of a job posting. If the city regards the submitted job descriptions as open to the public, then that information is subject to section 552.022(a)(15) and may not be withheld unless made confidential under the Act or other law. You seek to withhold the information subject to section 552.022 under section 552.103 of the Government Code. However, section 552.103 is discretionary in nature and does not make information confidential under the Act. *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); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 564 (1990). Therefore, the information subject to section 552.022 may not be withheld under section 552.103. As you no raise no further exceptions to disclosure of the job descriptions, which we have marked, then, if the city considers the job descriptions as open to the public, they must be released pursuant to section 552.022(a)(15) of the Government Code. However, the information subject to section 552.022(a)(1) may be withheld under section 552.108, accordingly, we will address your argument under this exception for the information subject to section 552.022(a)(1). Further, because section 552.101 makes information confidential under the Act, we will consider your argument under this exception for the information subject to section 552.022(a)(1). In addition, we will consider the city's argument under section 552.103 for the information not subject to section 552.022.

Section 552.103 of the Government Code provides, in relevant 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). 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).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). 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." *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, an attorney for a potential opposing party making a demand for payment and asserting an intent to sue if such payments are not made. Open Records Decision Nos. 555 at 3 (1990), 346 (1982). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party threatened to sue on several occasions and hired an attorney. *See* Open Records Decision No. 288 at 2 (1981). However, an individual publicly threatening to bring suit against a governmental body, but who does not actually take objective steps toward filing suit, is not concrete evidence that litigation is reasonably anticipated. *See* Open Records Decision No. 331 at 1-2 (1982). In Open Records Decision No. 638 (1996), this office stated a governmental body has met its burden of showing litigation is reasonably anticipated by representing it received a notice-of-claim letter that is in compliance with the Texas Tort Claims Act ("TTCA"), chapter 101 of the Civil Practices and Remedies Code. If that representation is not made, the receipt of a 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.

You state, and provide documentation showing, concurrent with the city's receipt of the instant request for information, the city received a letter asserting the requestor's client suffered personal injuries as a result of his incarceration at the city's jail. The letter further

demands the preservation of evidence and the requestor also directs the city to preserve evidence, stating that “[a]ny removal, alteration, modification, and/or destruction of [the evidence] may be deemed spoliation of evidence which could lead to further legal costs incurred by [the city].” You do not affirmatively represent to this office the notice of claim complies with the TTCA or an applicable ordinance; therefore, we will only consider the notice of claim as a factor in determining whether the city reasonably anticipated litigation. Nevertheless, based on your representations, our review of the information at issue, and the totality of the circumstances, we determine the city has established it reasonably anticipated litigation prior to the date it received the request for information. We further find the information at issue is related to the anticipated litigation for purposes of section 552.103. Accordingly, we conclude the city may withhold the information not subject to section 552.022 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 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. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

We will now address your arguments against disclosure of the information subject to section 552.022(a)(1) of the Government Code. Section 552.108(a)(2) of the Government Code exempts from disclosure information concerning an investigation that concluded in a result other than conviction or deferred adjudication. Gov’t Code § 552.108(a)(2). A governmental body claiming section 552.108(a)(2) must demonstrate the requested information relates to a criminal investigation that has concluded in a final result other than a conviction or deferred adjudication. *See id.* § 552.301(e) (governmental body must provide comments explaining why exceptions raised should apply to information requested). You state the information subject to section 552.022(a)(1) relates to a concluded case that did not result in a conviction or deferred adjudication. Based on your representation and our review, we conclude the information we have marked is subject to section 552.108(a)(2) of the Government Code. Thus, the city may withhold the information we marked under section 552.108(a)(2) of the Government Code.<sup>3</sup> However, we note the remaining information, which consists of a completed performance evaluation, is not information that deals with the detection, investigation, or prosecution of crime only in relation to a criminal investigation that did not result in conviction or deferred adjudication. Therefore, the city has failed to demonstrate the applicability of section 552.108(a)(2) to the remaining information, and the city may not withhold the remaining information on that basis.

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<sup>3</sup>As our ruling on this information is dispositive, we need not address your remaining argument against its disclosure.


Section 552.108 does not except from disclosure basic information about an arrested person, an arrest, or a crime. *Id.* § 552.108(c). Basic information refers to the information held to be public in *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). *See* Open Records Decision No. 127 (1976) (summarizing types of information made public by *Houston Chronicle*). Thus, with the exception of basic information, which must be released, the city may withhold the information we have marked pursuant to section 552.108(a)(2) of the Government Code.

In summary, the city must release the job descriptions we have marked if the city considers the job descriptions as open to the public pursuant to section 552.022(a)(15) of the Government Code. The city may withhold the information not subject to section 552.022 under section 552.103 of the Government Code. With the exception of basic information, which must be released, the city may withhold the information we have marked pursuant to section 552.108(a)(2) 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](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 Copeland  
Assistant Attorney General  
Open Records Division

JC/sb

Ref: ID# 662675

Enc. Submitted documents

c: Requestor  
(w/o enclosures)