



October 27, 2000

Ms. Elizabeth Elam  
Taylor, Olson, Adkins, Sralla & Elam  
3400 Bank One Tower  
500 Throckmorton Street  
Fort Worth, Texas 76102-3821

OR2000-4181

Dear Ms. Elam:

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# 141009.

The Town of Fairview (the "town"), which you represent, received two requests from the same requestor which collectively seek:

1. All documents, correspondence, letters or memoranda received by the town from Mr. Charles Stover or Ms. Anita Stover (the Stovers), or from their legal representatives or agents, from January 1, 1998 to August 15, 1999.
2. Copies of any and all letters the town sent to the Stovers from January 1, 1998 to August 15, 1999.
3. The total amount of acreage, broken down by year, that the town has annexed for the ten years preceding June 27, 1999.

You have submitted for our review information that is responsive to the requests. You assert that this information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you assert and reviewed the submitted information.

Section 552.103 of the Government Code, the "litigation exception," excepts from disclosure information:

[R]elating 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.

[Information is excepted from disclosure] 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. Section 552.103 was intended to prevent the use of the Act as a method of avoiding the rules of discovery in litigation. Attorney General Opinion JM-1048 at 4 (1989). The litigation exception enables a governmental body to protect its position in litigation by requiring information related to the litigation to be obtained through discovery. Open Records Decision No. 551 at 3 (1990). To show that the litigation exception is applicable, the town must demonstrate that (1) litigation was pending or reasonably anticipated at the time of the request and (2) the information at issue is related to that litigation. See Gov't Code § 552.103(a), (c); see also *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). You assert that litigation was reasonably anticipated at the time of the requests. To demonstrate that litigation is reasonably anticipated, the town must furnish evidence that, at the time of the request, litigation was realistically contemplated and was more than mere conjecture. Gov't Code § 552.103(c); Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). You have provided for our review correspondence from the Stovers' attorney and from the Stovers which, you contend, demonstrate the applicability of section 552.103. This office has found that where a governmental body receives a demand letter from an attorney which threatens suit, litigation is reasonably anticipated for purposes of section 552.103. Open Records Decision No. 346 at 2 (1982).

As to the first prong of the above-stated test, you have submitted correspondence from the Stovers' attorney, evidently received by the town prior to the present requests, which makes demands and specifically threatens suit. We therefore agree that litigation was reasonably anticipated at the time the town received the present requests. As to the second prong of the above-stated test, upon review of the submitted information, we also agree that the requested information relates to the anticipated litigation. We thus conclude that you have demonstrated the applicability of the litigation exception.

However, absent special circumstances, once information has been obtained by all parties to the litigation, e.g., through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, to the extent the opposing party in the anticipated litigation has seen or had access to any of the submitted information, there is no justification for withholding that information from the requestor pursuant to section 552.103. In the instant case, the requestor is the legal

representative for the opposing party in the anticipated litigation. We note that many of the submitted documents comprise information to which the requestor or the requestor's clients evidently previously had access, or which were provided to the town by the requestor or the requestor's clients. The town must release these documents, as well as any other responsive information, to the extent that the Stovers or their legal representative has seen or had access to the information. For your convenience, we have marked with red flags those documents which neither the requestor, his clients, nor any of the clients' legal representatives appear to have seen or had access. If so, you may withhold these documents under section 552.103. The documents we have marked with yellow flags came from the Stovers or their legal representative and therefore are not excepted by section 552.103. However, these documents contain notations which apparently have not been made available to the opposing party in the anticipated litigation. If so, the town may redact the notations from the yellow-flagged documents prior to their release. We also note that the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Finally, we also have identified certain documents, marked with green flags, to which you have demonstrated the applicability of section 552.103, but which nevertheless are not excepted from required public disclosure. Section 552.103 does not authorize the withholding of information which has already been made available to the public. Open Records Decision No. 436 (1986). Minutes of public meetings are also not subject to withholding under section 552.103. *See* Gov't Code § 551.022. Thus, the town must release the deed records that were evidently obtained from public records, and the minutes of a town council meeting.

In summary, you have demonstrated the applicability of section 552.103 to the requested information. Nevertheless, you must release the documents we have marked with green flags. You must also release to the requestor any information to which the opposing party in the anticipated litigation has seen or had access. You may withhold the remaining information pursuant to section 552.103 of the Government Code.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the

governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

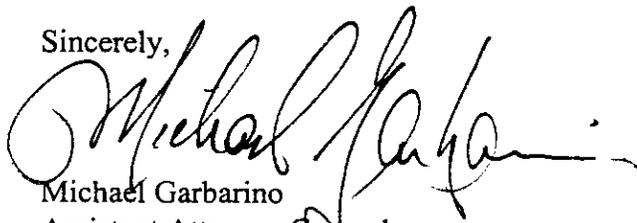
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Michael Garbarino  
Assistant Attorney General  
Open Records Division

MG/pr

Ref: ID# 141009

Encl. Submitted documents

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Mr. Scott Albert  
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