



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

June 27, 2003

Ms. Trudi Dill
Deputy City Attorney
City of Temple
Municipal Building
Temple, Texas 76501

OR2003-4427

Dear Ms. Dill:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 183441.

The City of Temple (the "city") received a request for the following information:

Any and all records, documents, inspection reports, contracts, maps, drawings, and all records that may pertain in any way to the repair and or replacement of sewer and or [sic] utility lines at or on the property located at 1006 North 7th Street, Temple, Bell County, Texas, in November, December 2000 and January, February 2001. Also all records, logs complaints [sic], or forms relating in any manner to the captioned address in 2002. Records are requested as to work or services performed by the City of Temple, or its contractors, or assigns.

You state that the city determined, upon a search of city records, that the city does not possess records or other forms of information pertaining to repair or replacement, by city employees or contractors, of sewer or utility lines serving the specified address. A governmental body must make a good faith effort to relate a request to information which it holds. *See* Open Records Decision No. 561 at 8 (1990). We note, however, that the Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ dism'd); Open Records

Decision No. 452 at 3 (1986). You claim that information responsive to the request for records, logs, complaints, or forms relating to the address is excepted from disclosure under section 552.103 of the Government Code.¹ We have considered the exception you claim and reviewed the submitted representative sample of information.²

Section 552.103 of the Government Code provides 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.

A governmental body 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 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. *University of Tex. Law Sch. v. Texas 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

¹ You also contend that a report prepared by a consulting engineer for the city's insurer may be subject to the consulting expert privilege under Rule 192.3(e) of the Texas Rules of Civil Procedure. You indicate, however, that it is unclear to the city whether the report is responsive to the present request. Thus, you inform us that the city contacted the requestor to ask for clarification of the scope of the request. See Gov't Code § 552.222 (providing that a governmental body may ask the requestor to clarify the request if what information is requested is unclear to the governmental body); see also Open Records Decision No. 663 at 5 (1999) (discussing requests for clarification). You state that the requestor has not responded to the city's request for clarification. Consequently, we do not address the public availability of the consulting engineer's report in this ruling.

² We assume that 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.

at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that 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." Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). In Open Records Decision No. 638 (1996), this office stated that a governmental body has met its burden of showing that litigation is reasonably anticipated when it received a notice of claim letter and the governmental body represents that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act ("TTCA"), chapter 101 of the Civil Practice and Remedies Code, or an applicable municipal ordinance. If a governmental body does not make this representation, the claim letter is a factor that this office will consider in determining whether a governmental body has established that litigation is reasonably anticipated based on the totality of the circumstances.

You have submitted a copy of a letter the city received from the requestor on July 25, 2002, in which the requestor seeks compensation for damage the requestor allegedly suffered due to the city's negligence.³ You do not indicate that the July 25, 2002 letter conforms with the TTCA. However, you state that the city referred the requestor's demand to the city's insurance carrier for defense and indemnity. On January 28, 2003, after speaking with an adjuster for the city's insurer, the requestor contacted the city and informed the city that the requestor was considering filing a lawsuit in this matter. You inform us that the requestor again contacted the city after receiving the insurer's settlement offer of March 15, 2003. You state that in that conversation, the requestor advised that he would not accept the proposed settlement and inquired about filing suit against the city. Thus, you assert that a reasonable basis for the city's anticipation of litigation in this matter was established prior to the city's receipt of the present request for information on April 10, 2003. Upon review of the submitted information and in consideration of the totality of the circumstances, we determine that the city reasonably anticipated litigation on the date the city received the present request for information. Furthermore, we agree that the information at issue relates to the anticipated litigation. Thus, we conclude that the city may withhold the submitted information under section 552.103 of the Government Code.

We note, however, that 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. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all opposing parties in the anticipated lawsuit is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded or is no

³ In a typographical error, your brief to this office states that the city received the requestor's notice of claim on July 25, 2003. The letter bears the city's stamp indicating it was received on July 25, 2002.

longer anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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 Dep't of Pub. 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 Hadassah Schloss at the Texas Building and Procurement 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. We note that a third party may challenge

this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,

A handwritten signature in black ink, appearing to read 'David R. Saldivar', with a long horizontal flourish extending to the right.

David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 181539

Enc: Submitted documents

c: Mr. J. Marlin Blackledge
Attorney at Law
506 Franklin Avenue
Waco, Texas 76701
(w/o enclosures)