



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

April 8, 2004

The Honorable Mary Horn  
Denton County Judge  
110 West Hickory  
Denton, Texas 76201

Mr. John Feldt  
Assistant District Attorney  
Denton County Criminal District Attorney's Office  
P.O. Box 2850  
Denton, Texas 76202

OR2004-2880

Dear Judge Horn and Mr. Feldt:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 199000.

Denton County (the "county") received a request for the names and addresses of all individuals who have submitted comments regarding a proposed expansion project involving FM 2499, Section 4. The county claims that the requested information is excepted from disclosure under sections 552.101, 552.103, and 552.105 of the Government Code.<sup>1</sup> We have considered the exceptions you claim and have reviewed the information you submitted.<sup>2</sup>

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<sup>1</sup>As the county also initially raised sections 552.104, 552.107, 552.109, 552.110, 552.111, 552.113, 552.131, and 552.137, but has submitted no arguments in support of these exceptions, this decision does not address sections 552.104, 552.107, 552.109, 552.110, 552.111, 552.113, 552.131, and 552.137. *See* Gov't Code §§ 552.301, 302.

<sup>2</sup>This letter ruling assumes that the submitted representative sample of information is truly representative of the responsive information as a whole. This ruling neither reaches nor authorizes the county to withhold any information that is substantially different from the submitted information. *See* Gov't Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

Initially, we address the county's assertion that federal law may pre-empt the applicability of the Public Information Act, (the "Act"), chapter 552 of the Government Code, to the requested information. The United States Supreme Court had said that

[p]re-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law . . . when there is outright or actual conflict between federal or state law . . . where compliance with both federal and state law is in effect physically impossible . . . where there is implicit in federal law a barrier to state regulation . . . where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law . . . or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.

*Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368-69 (1986). The Supreme Court also has said that congressional intent to pre-empt state law must be clear. *See Dep't of Revenue of Oregon v. ACF Indus.*, 510 U.S. 332, 345 (1994); *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991); *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990).

As this office recently emphasized, "[s]ection 552.021 of the [Act] is a mandate in Texas law that compels Texas governmental bodies to disclose information to the public." *See Open Records Decision No. 681 at 8 (2004)*. The county contends, however, that "[f]ederal law and the Federal Freedom of Information Act (FOIA) pre-empt the Texas Public Information Act" in this instance. The county argues that "[f]ederal law may prevent [the c]ounty from releasing the names and addresses of citizens who made public comments regarding the Section 4 project until after final approval of the [county's] Comment and Response Report and issuance of the FONSI [finding of no significant (environmental) impact] by the Federal Highway Administration." We note that FOIA applies only to federal agencies. Therefore, FOIA is not applicable to information held by a governmental body of the state of Texas. *See Open Records Decision No. 561 at 7 (1990)*. Furthermore, the county has not directed our attention to any other federal law, nor are we aware of any such law, that would pre-empt the applicability of the Act to responsive information held by the county or that would prevent the county from releasing such information in accordance with the Act. Therefore, the requested information must be released unless it is shown to come within the scope of one of the Act's exceptions to required public disclosure. *See Gov't Code §§ 552.001, .006, .021*.

Section 552.101 excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses constitutional and common-law rights to privacy. Constitutional privacy protects two kinds of interests. *See Open Records Decision Nos. 600 at 3-5 (1992), 478 at 4 (1987), 455 at 3-7 (1987); see also Whalen v. Roe*, 429 U.S. 589, 599-600 (1977). The first is the interest in independence in making certain important decisions

related to the “zones of privacy,” pertaining to marriage, procreation, contraception, family relationships, and child rearing and education. that have been recognized by the United States Supreme Court. *See* Open Records Decision No. 455 at 3-7 (1987); *see also Fajjo v. Coon*, 633 F.2d 1172 (5<sup>th</sup> Cir. 1981). The second constitutionally protected privacy interest is in freedom from public disclosure of certain personal matters. *See* Open Records Decision No. 455 at 6-7 (1987); *see also Ramie v. City of Hedwig Village, Tex.*, 765 F.2d 490 (5<sup>th</sup> Cir. 1985), *reh'g denied*, 770 F.2d 1081 (1985), *cert. denied*, 474 U.S. 1062 (1986). This aspect of constitutional privacy balances the individual’s privacy interest against the public’s interest in the information. *See* Open Records Decision No. 455 at 7 (1987). Constitutional privacy under section 552.101 is reserved for “the most intimate aspects of human affairs.” *Id.* at 8 (quoting *Ramie v. City of Hedwig Village*, 765 F.2d at 492).

The common-law right to privacy protects information that is (1) highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, *and* (2) of no legitimate public interest. *See Industrial Found. v. Texas Ind. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy encompasses the specific types of information that the Texas Supreme Court held to be intimate or embarrassing in *Industrial Foundation*. *See* 540 S.W.2d at 683 (information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs). This office has since concluded that other types of information also are private under section 552.101. *See* Open Records Decision Nos. 659 at 4-5 (1999) (summarizing information attorney general has determined to be private), 470 at 4 (1987) (illness from severe emotional job-related stress), 455 at 9 (1987) (prescription drugs, illnesses, operations, and physical handicaps), 343 at 1-2 (1982) (references in emergency medical records to drug overdose, acute alcohol intoxication, obstetrical/gynecological illness, convulsions/seizures, or emotional/mental distress).

In Open Records Decision No. 169 (1977), this office concluded that under certain “special circumstances,” privacy under section 552.101 will protect information that ordinarily would be subject to public disclosure. *Id.* at 6-7. However, such “special circumstances” encompass a very narrow set of situations. *Id.* at 6. “Special circumstances” do not include a mere desire for privacy or “a generalized and speculative fear of harassment or retribution.” *Id.* On the other hand, they do include situations in which release of the information at issue would likely cause someone to face “an imminent threat of physical danger.” *Id.* We determine whether a request for information presents such “special circumstances” on a case-by-case basis. *Id.* at 7.

The county seeks to withhold the names and addresses of citizens who have submitted public comments regarding the Section 4 expansion project. The county informs us that these individuals were not informed that their personal information would not be kept confidential. The county is “concerned that public disclosure of the names and addresses of these citizens could potentially threaten their peace and well-being[.]” We first note that information is not

confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d at 677. Furthermore, this office has concluded that public disclosure of an individual's name, home address, and telephone number is not an invasion of privacy. See Open Records Decision Nos. 554 at 3 (1990); see also Open Records Decision No. 455 at 7 (1987) (home addresses and telephone numbers do not qualify as "intimate aspects of human affairs"). Having considered the county's arguments, we conclude that you have not demonstrated the existence of special circumstances or any other basis for a conclusion that any of the submitted information must be withheld on privacy grounds. We therefore conclude that the county may not withhold any of the requested information under section 552.101 in conjunction with constitutional or common-law privacy.

Next, we address your claim under section 552.103. This exception provides in 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 sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) that the information at issue is related to that litigation. See *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. See Open Records Decision No. 551 at 4 (1990) *Id.*

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 that litigation is reasonably anticipated, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.*

Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), *see* Open Records Decision No. 336 (1982); (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

The county does not inform us that the requested information relates to any pending litigation to which the county was a party when it received the present request for information. The county asserts, however, that it has been informed of "'a resident with standing' who has retained an attorney for purposes of commencing 'legal proceedings with respect to the proposed 2499 Section 4.'" The county contends that this communication constitutes "a real threat that litigation regarding the Section 4 project was reasonably anticipated as of the date that Denton County received the requestor's public information request." Having considered the county's arguments, we conclude that you have not established that litigation was reasonably anticipated on the date of the county's receipt of this request for information. *See* Open Records Decision Nos. 452 at 4 (1986) (statutory predecessor to Gov't Code § 552.103 required concrete evidence showing that claim that litigation may ensue is more than mere conjecture), 331 at 1-2 (1982) (mere chance of litigation not sufficient to trigger statutory predecessor). Therefore, the county may not withhold any of the requested information under section 552.103.

Lastly, we address the county's claim under section 552.105. This section protects information that relates to:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Gov't Code § 552.105. Section 552.105 is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. *See* Open Records Decision Nos. 564 (1990), 357 (1982), 310 (1982). Information that pertains to such negotiations may be withheld under section 552.105 for so long as the transaction relating to the negotiations is not complete. *See* Open Records Decision No. 310 (1982). Under section 552.105, a governmental body may withhold information "which, if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" Open Records Decision No. 357 at 3 (1982) (quoting Open Records Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiating position in regard to a particular transaction is a question of fact. *See* Open Records Decision No. 564 at 2 (1990).

Accordingly, this office will accept a governmental body's good faith determination in this regard, unless the contrary is clearly shown as a matter of law. *Id.*

The county informs us that it is in the process of acquiring rights-of-way for the Section 4 project. The county explains that it seeks to withhold the names and addresses of citizens who have made public comments because this information may disclose the names of landowners involved in land acquisition negotiations with the county. The county states that it seeks to protect information that might relate to the location, appraisals, and purchase price of specific right-of-way in the proposed Section 4 route. The county does not inform us, however, that it has made a good-faith determination that public disclosure of any specific information encompassed by this request would impair the county's planning and negotiating position with regard to a specific transaction. Having considered the county's arguments, we conclude that you have not demonstrated that any of the requested information is excepted from disclosure under section 552.105. As the county claims no other exception to the disclosure of any of this information, the county must release the requested information in its entirety.

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).

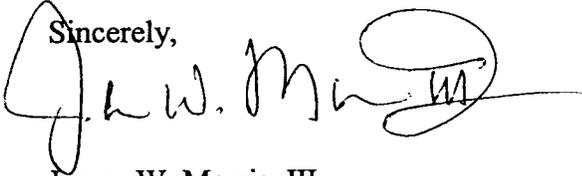
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 "J.W. Morris, III". The signature is fluid and cursive, with a large initial "J" and "M".

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

Ref: ID# 199000

Enc: Submitted documents

c: Mr. Paul LeBon  
2640 Hillside Drive  
Highland Village, Texas 75077  
(w/o enclosures)