



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 28, 2004

Ms. Susan C. Rocha
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OR2004-4403

Dear Ms. Rocha:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 202578.

The San Antonio Water System (the "system"), which you represent, received a request for fifteen categories of information related to the Lower Guadalupe Water Supply Project (the "LGWSP"). You state that the system will provide the requestor with some of the requested information. You also state that the system does not have a log responsive to category fifteen of the request for information.¹ You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.104, 552.105, 552.106, 552.107, 552.110, 552.111, 552.113, 552.131, 552.137, and 552.139 of the Government Code. Additionally, you have notified fourteen interested third parties of the system's receipt

¹We note that the Public Information Act ("Act") does not require the system to answer factual questions, perform legal research, or create new information in responding to a request. *See* Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 534 at 2-3 (1989); *see also* *AT&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 676 (Tex.1995); *Fish v. Dallas Indep. Sch. Dist.*, 31 S.W.3d 678, 681 (Tex. App.—Eastland, pet. denied). Additionally, we note that the Act does not require the system 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 dismissed); Open Records Decision No. 452 at 3 (1986); *see also* Attorney General Opinion JM-48 (1983) (governmental body not required to comply with standing request for information to be collected or prepared in future). However, the system must make a good faith attempt to relate a request to information it holds. *See* Open Records Decision No. 561 at 8 (1990).

of the request for information pursuant to section 552.305 of the Government Code.² *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Act in certain circumstances). The system has submitted a representative sample of the information at issue to this office.³ We have considered your arguments and reviewed the submitted information.

Initially, you state that the computer user names and passwords in the responsive information "allow access to the portal for the LGWSP," and "could also allow an individual access to the complete server (i.e. documents, e-mails, etc.) of the [system, the Guadalupe River Authority, and the San Antonio River Authority] mainframe computer systems." Additionally, you assert that the Act "does not require governmental bodies to disclose information that would breach the security of government computers." In Open Records Decision No. 581 (1990), this office determined that certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. Based on your representations and our review of the information at issue, we conclude that the computer user names and passwords we have marked do not constitute public information under section 552.002 of the Act. Accordingly, this information is not subject to the Act and need not be released.⁴

In regard to the remaining responsive information, 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

²The interested third parties you notified are: Academy of Natural Sciences; Dublin and Associates, Inc.; Locke Liddell & Sapp, LLP; Espey Consultants, Inc.; HDR Engineering, Inc.; Hillco Partners; LBG Guyton, Inc.; Lee Wilson and Associates; Marr, Meier & Bradicich, L.L.P.; Texas A&M University - Corpus Christi; Texas Agriculture Experiment System; The Thompson Agency; The University of Texas; and URS Corps.

³We 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). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

⁴As we are able to make this determination, we need not address your argument under section 552.139 of the Government Code.

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

Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the system must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. 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). 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). A governmental body may also establish that litigation is reasonably anticipated by the receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990).

You explain that the LGWSP is a joint project of the Guadalupe River Authority, the San Antonio River Authority, and the system, and that the LGWSP "is a long term water supply initiative designed to ultimately deliver approximately 95,000 acre feet of water annually to the San Antonio region at costs in excess of \$700,000,000." You assert that "there is a threat of anticipated litigation by the landowners through whose property pipeline for [the LGWSP]

will run.” Additionally, you have submitted to this office an affidavit of Susan Butler, Director of Water Resources for the system, in which she states that

[i]n a meeting on March 4, 2004 . . . Mr. Blackburn, attorney representing the D.M. O’Connor interests, and Mark Rose, consultant representing the D.M. O’Connor interests, attended and pledged, on behalf of their clients, to use every available means to halt the LGWSP. He told us that they would fight the project politically, at the grass roots level, in permitting processes, at the courthouse, and in the media. I clearly understood by his comments that they intended to use every means possible, including litigation, to stop [the LGWSP].

Based on the information you provided, we agree that litigation involving the system was reasonably anticipated at the time it received the instant request for information. In addition, we find that the remaining responsive information is related to the anticipated litigation for purposes of section 552.103(a). Thus, you may withhold the remaining responsive information pursuant to 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. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all other parties in 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. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). As we are able to make this determination, we need not address your remaining arguments.

In summary, we conclude that: 1) the computer user names and passwords we have marked are not public information and therefore not subject to the Act; and 2) all remaining responsive information may be withheld 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).

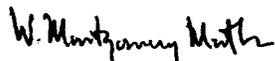
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 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,



W. Montgomery Meitler
Assistant Attorney General
Open Records Division

WMM/krl

Ref: ID# 202578

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