



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 23, 2005

Ms. Paige H. Saenz  
Barney Knight & Associates  
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223 West Anderson Lane, Suite A-105  
Austin, Texas 78752

OR2005-01599

Dear Ms. Saenz:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 219175.

The City of Cottonwood Shores (the "city"), which you represent, received five requests from two requestors for information related to the city's annexation, zoning, and proposed development of three specific properties. You state that you have provided the requestors with a portion of the requested information. You contend that the first two requests for information are not proper requests under the Public Information Act (the "Act") to which the city is required to respond. Additionally, you claim that the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered your arguments and reviewed the submitted representative sample of information.<sup>1</sup> We have also considered comments submitted by the first requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

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<sup>1</sup> 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.

Initially, we address your contention that the first two requests for information are not proper requests under the Act. The Act's disclosure requirements are generally triggered by a governmental body's receipt of a written request for information. *See* Gov't Code § 552.301(a). However, in instances where a written request is submitted to a governmental body by facsimile transmission or through e-mail, the Act, as you note, specifically provides that the request be "sent to the officer for public information, or the person designated by that officer[.]" *Id.* § 552.301(c). Thus, for written requests that are submitted to a governmental body via facsimile or e-mail, the Act's disclosure requirements are triggered only if the request is sent to the governmental body's "officer for public information," or by a person designated by that officer to receive such requests.

In this case, you state that the first two requests were addressed and faxed to the Assistant City Attorney in Austin. You further state that "[t]he City Attorney or Assistant City Attorney are not persons designated by the officer of public information to receive open record's requests in Cottonwood Shores."<sup>2</sup> *See* Gov't Code § 552.201 (officer for public information is defined as chief administrative officer of governmental body). We thus conclude that the first two faxed requests at issue here were not proper requests under the Act, and the city need not respond to these requests as they fail to comply with the Act.

We now turn to your arguments for the information responsive to requests three, four, and five, which did comply with the Act, and note that this information includes the agendas of public meetings of governmental bodies. The agendas of a governmental body's public meetings are specifically made public by statute. *See* Gov't Code §§ 551.022 (minutes and tape recordings), 551.043 (notice). Information made public by statute may not be withheld from the public under any of the Act's exceptions to public disclosure. *See, e.g.,* Open Records Decision Nos. 544 (1990), 378 (1983), 161 (1977), 146 (1976). Accordingly, the agendas of the public meetings must be released in accordance with the Open Meetings Act.

Next, we note that a portion of the remaining information at issue consists of a completed report and a completed evaluation, which are subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

- (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

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<sup>2</sup> The first requestor argues that he originally faxed his first request on November 23<sup>rd</sup>. However, the city contends that it did not receive this request. While the first requestor and the city disagree on the effective receipt date of the first request, neither party disputes that the requestor faxed a request for information to the Assistant City Attorney rather than the city secretary.

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

Gov't Code § 552.022(a)(1). In this instance, the completed report and evaluation must be released under section 552.022(a)(1) unless they are expressly confidential under other law or excepted from disclosure under section 552.108. The city raises section 552.103 for this information. Section 552.103 is a discretionary exception under the Act and does not constitute "other law" for purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (stating that governmental body may waive section 552.103). Thus the city may not withhold the completed report or evaluation under section 552.103 of the Government Code. As the city claims no other exceptions for this information, which we have marked, it must be released.

In regard to the remaining information that is not subject to section 552.022, section 552.103 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.

Gov't Code § 552.103. 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. *Univ. of Tex. Law Sch. v. Tex. 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 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. *See id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body’s receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

In your letter of December 22, 2004, which accompanied your request for a ruling regarding the third request, you stated that the city reasonably anticipated a lawsuit attacking the annexation, zoning, and proposed development of the properties at issue. You also stated that the one of the requestors represents persons who live near the properties who oppose the city’s actions, and that this requestor has sent written threats of litigation, as well as attended several city council meetings and threatened litigation. In your January 24, 2005 letter, you informed our office that prior to receiving the fourth and fifth requests, the city was served with a lawsuit, which attacks the annexation, zoning, and proposed development of the properties at issue.

Based on your representations and our review of the information at issue, we find that the city reasonably anticipated litigation relating to the annexation, zoning, and proposed development of the properties at issue at the time it received the third request. Additionally, we find that litigation was pending on the date the city received the fourth and fifth requests. We further find that the information at issue relates to the anticipated and pending litigation. We therefore conclude that the city may withhold the remaining submitted information pursuant to section 552.103.

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 the opposing party in litigation 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. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the city need not respond to the first two requests as they fail to comply with the Act. The city must release the agendas of the public meetings in accordance with the Open Meetings Act. The city must also release the completed report and evaluation under section 552.022(a)(1). The remaining information may be withheld pursuant to section

552.103 of the Government Code. As our ruling is dispositive, we need not address your remaining arguments against disclosure.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,



Lauren E. Kleine  
Assistant Attorney General  
Open Records Division

LEK/jev

Ref: ID# 219175

Enc. Submitted documents

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