



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 30, 2006

Mr. William D. Dugat III
Bickerstaff, Heath, Smiley,
Pollan, Kever & McDaniel, L.L.P.
816 Congress Avenue, Suite 1700
Austin, Texas 78701

OR2006-00978

Dear Mr. Dugat:

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# 241218.

The City of Woodcreek (the "city"), which you represent, received three separate requests for information related to the negotiation and settlement of water and sewer rates between the city and Aqua Utilities, Inc. and Aqua Development, Inc. (collectively "Aqua Texas"). You state you have released some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by two of the requestors. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we address your representation that the city sent two requestors a written itemized statement of estimated charges with regard to their requests for information; we note that you have submitted copies of these itemized statements to this office. *See* Gov't Code § 552.2615. You inform us that one of these requestors modified her request upon receipt of her itemized statement. However, you inform us that the other requestor who received an itemized statement did not respond within the time prescribed by section 552.2615(b). Based on your representations and our review of the submitted documentation, we conclude that the requestor who did not respond to the itemized statement has had her request for information withdrawn by operation of law. *See id.* § 552.2615(b). Accordingly, the city need not release any submitted information that would be responsive to that request alone.

¹Although you initially raised section 552.101 of the Government Code, you have submitted no arguments under this exception.

Next, we address your claim that all of the submitted information is excepted by section 552.103 of the Government Code. Section 552.103 provides in relevant part 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 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). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103 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 that 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 section 552.103.

Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, a governmental body 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, *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).

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. Open Records Decision No. 361 (1983).

You explain the city was formerly involved in a dispute with Aqua Texas over an increase in water and sewer rates charged by Aqua Texas. You inform us that the dispute ultimately was referred to the State Office of Administrative Hearings ("SOAH") and constituted a contested case before SOAH under the Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code. *See* Open Records Decision No. 588 (1991) (contested case under APA constitutes litigation for purposes of statutory predecessor to section 552.103). You further explain that the city resolved this dispute with Aqua Texas through negotiations which culminated in the settlement at issue. You argue that section 552.103 of the Government Code applies to all the submitted information because the city reasonably anticipates litigation related to its settlement with Aqua Texas.

You state that many Aqua Texas ratepayers affected by the city's settlement with Aqua Texas are dissatisfied with the settlement rates and have threatened litigation against the city. You argue that the city reasonably anticipates litigation related to its settlement with Aqua Texas based on the following: (1) an e-mail sent to an Aqua Texas representative by a ratepayer regarding his complaint to the United States Department of Justice that the settlement discriminates against disabled ratepayers; (2) another e-mail from the same ratepayer sent to representatives of various entities, including the Texas Commission on Environmental Quality ("TCEQ"), requesting TCEQ independently initiate on its own an administrative hearing regarding the settlement between the city and Aqua Texas, *see* Water Code § 13.187(f), Tex. Admin. Code § 291.28 (allowing TCEQ to set by its own motion a hearing on rate changes); and (3) the plan of ratepayers affected by the settlement to appeal the city's settlement directly to TCEQ, *see* Water Code § 13.043(b), 30 Tex. Admin. Code §§ 291.41, .42 (allowing appeal of rate changes by filing petition for review with TCEQ that is signed by ten percent of ratepayers whose rates have been changed). Based upon our review of the city's arguments and representations, as well as the totality of the circumstances presented, we conclude that city has demonstrated that it reasonably anticipated litigation related to its settlement with Aqua Texas on the date it received the requests for information. Furthermore, upon review of the submitted information we determine that it is related to the anticipated litigation. Accordingly, the submitted information may be withheld by the city pursuant section 552.103.²

In reaching this conclusion, we assume that the opposing party in the anticipated litigation has not seen or had access to any of the information that the city seeks to withhold under section 552.103. The purpose of this exception is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that relates to litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). If the opposing party has seen or had access to information that relates to anticipated litigation, through discovery or otherwise, then there is no interest in withholding such information

²As our ruling on these issues is dispositive, we need not address your remaining arguments against disclosure.

from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We further note that the applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the submitted 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, 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); *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 Office of the Attorney General 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,



Ramsey A. Abarca
Assistant Attorney General
Open Records Division

RAA/krl

Ref: ID# 241218

Enc. Submitted documents

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