



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 2, 2007

Mr. Mark H. Zeppa
Law Offices of Mark H. Zeppa, P.C.
4833 Spicewood Springs Road Suite 202
Austin, Texas 78759-8436

OR2007-14395

Dear Mr. Zeppa:

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# 293587.

The G&W Water Supply Corporation (the "corporation"), which you represent, received a request for (1) its bylaws; (2) information reflecting the location or capacity of infrastructure; (3) the corporation's most recent audited financial statements; (4) the most recent financial statement presented to the board of directors; (4) information relating to capital improvements; (5) information reflecting plans to build infrastructure or provide service in the southeastern portion of the corporation's certificate of public convenience and necessity; and (6) records of board meetings and information relating to certain enforcement actions taken against the corporation by the Texas Commission on Environmental Quality. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and have reviewed the information you submitted. We also have considered the comments that we received from the requestor. *See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

We first note that the submitted information includes minutes of open meetings. Section 551.022 of the Open Meetings Act, chapter 551 of the Government Code, provides that the "minutes and tape recordings of an open meeting are public records and shall be available for public inspection and copying on request to the governmental body's chief administrative officer or the officer's designee." Gov't Code § 551.022. Information that is specifically made public by statute may not be withheld from the public under any of the exceptions to public disclosure under the Act. *See, e.g.,* Open Records Decision Nos. 544

(1990), 378 (1983), 161 (1977), 146 (1976). Therefore, the meeting minutes must be released pursuant to section 551.022.

The submitted information also includes the corporation's bylaws, which appear to have been adopted by the corporation's board of directors in a public meeting. The board may not withhold such information under section 552.103 of the Government Code, and the bylaws must be released. *See* Open Records Decision Nos. 551 at 203 (1990) (laws or ordinances are open records), 221 at 1 (1979) ("official records of the public proceedings of a governmental body are among the most open of records").

We also note that section 552.022 of the Government Code is applicable to some of the submitted information. Section 552.022(a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body," unless the information is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. Gov't Code § 552.022(a)(1). Section 552.022(a)(3) provides for required public disclosure of "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body," unless the information is expressly confidential under other law. *Id.* § 552.022(a)(3). In this instance, the submitted information includes completed reports, maps associated with one of the reports, information in the corporation's accounts, and a contract, all of which are subject to section 552.022. Although the corporation seeks to withhold that information under section 552.103 of the Government Code, that section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (Gov't Code § 552.103 may be waived); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the corporation may not withhold any of the information that is subject to section 552.022 under section 552.103. As you claim no other exception to disclosure of that information, it must be released.

With respect to the rest of the submitted information, we address your claim under section 552.103 of the Government Code. 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). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. 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 [1st 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).

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.”¹ *Id.* You contend that the remaining information is related to anticipated litigation with the requestor’s client concerning the decertification of the corporation. Having considered your arguments, we find that you have not demonstrated that the corporation reasonably anticipated litigation on the date of its receipt of this request for information. *See* Water Code § 13.254(a-4) (Administrative Procedure Act, Gov’t Code ch. 2001, not applicable to petition for expedited decertification under Water Code § 13.254(a-1); 30 T.A.C. § 291.113(e) (same); Open Records Decision Nos. 588 (1991) (listing considerations relevant to determination of whether administrative proceeding constitutes litigation for purposes of Gov’t Code § 552.103), 361 (1983) (fact that request was made by attorney on behalf of rejected applicant not sufficient to invoke statutory predecessor to Gov’t Code § 552.103), 331 (1982) (reasonable anticipation of litigation not established by requestor’s public statements on more than one occasion of intent to file suit). We therefore conclude that the corporation may not withhold the remaining information under section 552.103 of the Government Code.

¹Among 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).

We note that section 552.136 of the Government Code is applicable to some of the remaining information.² Section 552.136(b) states that “[n]otwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b); *see id.* § 552.136(a) (defining “access device”). We have marked account numbers that the corporation must withhold under section 552.136.

In summary: (1) the meeting minutes must be released pursuant to section 551.022 of the Government Code; (2) the bylaws must be released; (3) the corporation must release the completed reports, maps, information in its accounts, and contract pursuant to section 552.022 of the Government Code; and (4) except for the account numbers that must be withheld under section 552.136 of the Government Code, the corporation also must release the rest of the submitted information.

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).

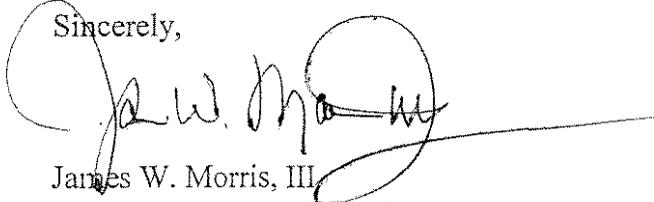
²Unlike other exceptions to disclosure under the Act, this office will raise section 552.136 on behalf of a governmental body, as this exception is mandatory and may not be waived. *See* Gov’t Code §§ 552.007, .352; Open Records Decision No. 674 at 3 n.4 (2001) (mandatory exceptions).

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,

A handwritten signature in black ink, appearing to read "J.W. Morris, III", with a long horizontal line extending to the right.

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

JWM/ma

Ref: ID# 293587

Enc: Submitted information

c: Mr. Michael A. Gershon
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(w/o enclosures)