



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 1, 2008

Mr. Michael A. Bucek
City Attorney
City of Corinth
3300 Corinth Parkway
Corinth, Texas 76208

OR2008-08891

Dear Mr. Bucek:

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# 314654.

The City of Corinth (the "city") received a request for information related to drainage issues pertaining to the property of the requestor's clients. 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 reviewed the submitted representative sample of information.¹

We begin by noting that one of the submitted documents in Exhibit K is not responsive to the instant request for information, as it was created after the date that the city received the request. This ruling does not address the public availability of any information that is not responsive to the request, and the city need not release that information in response to this request. *See Econ. 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) (governmental body not required to disclose information that did not exist at time request was received).

We next note that you did not submit information responsive to items 7, 14, 15, 19, and 20 of the request. We assume the city has released this information to the requestor. If it has

¹We 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.

not, it must do so at this time to the extent that such information existed on the date that the city received the request for information. See Gov't Code §§ 552.301(a), .302; Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible under circumstances). We caution, however, that section 552.352 of the Act imposes criminal penalties for the release of confidential information.

Next, we observe that the submitted documents include an agenda and minutes of open meetings. The notices, agendas, and minutes of a governmental body's public meetings are specifically made public under the Open Meetings Act, chapter 551 of the Government Code. See Gov't Code §§ 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying upon request), .043 (notice of meeting of governmental body must be posted in a place readily accessible to general public at least 72 hours before scheduled time of meeting), .053-.054 (district governing bodies required to post notice of meeting at a place convenient to the public in administrative office of district). Information that is specifically made public by statute may not be withheld from the public under any of the exceptions to public disclosure under chapter 552 of the Government Code. See, e.g., Open Records Decision Nos. 544 (1990), 378 (1983), 161 (1977), 146 (1976). Thus, the city may not withhold the agenda or minutes of the open meetings in Exhibits A, B, and D under the claimed exception and must release this information to the requestor in accordance with the Open Meetings Act.

We also note that the submitted documents contain information subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part, as follows:

(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:

(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). Exhibit S is a completed report subject to section 552.022(a)(1) of the Government Code. Therefore, the city may only withhold this information if it is confidential under "other law." Although you assert that this information is excepted from disclosure under section 552.103 of the Government Code, this section is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. See Gov't Code § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.— Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 665 at 2 n.5 (discretionary exceptions). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the city may not withhold any of the information that is subject to section 552.022 under section 552.103, but must release it to the requestor.

You claim that the remaining submitted information is excepted from public disclosure under section 552.103 of the Government Code, which 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).*

In order 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. *Id.* In *Open Records Decision No. 638 (1996)*, this office stated that a governmental body has met its burden of showing that litigation is reasonably anticipated when it received a notice of claim letter and the governmental body represents that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act ("TTCA"), chapter 101 of the Texas Civil Practice & Remedies Code, or an applicable municipal ordinance. If a governmental body does not make this representation, the claim letter is a factor that this office will consider in determining whether a governmental body has established that litigation is reasonably anticipated based on the totality of the circumstances. Concrete evidence to support a claim that litigation is reasonably anticipated may also include a potential opposing party hiring an attorney who makes a demand for disputed payments and threatens to sue if the payments are not made promptly. *See Open Records Decision No. 346 (1982).*

We understand you to assert that the city reasonably anticipates litigation relating to the subject of the present request. You state, and provide documentation showing, that the city received notice of a claim asserted against the city by the requestor, an attorney for the claimants, prior to the date you received this request for information. You do not affirmatively represent to this office that the claim letter is in compliance with the TTCA. You inform us, however, that the claim letter alleges that the city was negligently responsible for damages to the claimants' property, and the claimants are demanding monetary damages as settlement for the claims. After reviewing your arguments and the remaining documents, and based on the totality of the circumstances, we agree that the city reasonably anticipated litigation on the date the city received the request for information. Furthermore, we find that the information at issue relates to the anticipated litigation for purposes of section 552.103(a).

We note, however, that the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that is related to litigation through discovery procedures. *See* ORD 551 at 4-5. If the opposing party has seen or had access to information that is related to anticipated litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). In this instance, we note that Exhibits F, L, and M appear to have been seen or provided by the potential opposing party in the anticipated litigation. Accordingly, to the extent that the potential opposing party has seen these documents or any of the remaining submitted information, the city may not withhold the information under section 552.103 of the Government Code. However, to the extent that the potential opposing party has not seen the remaining submitted information, the city may withhold the information under section 552.103 of the Government Code. 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 agenda and minutes of the open meetings in Exhibits A, B, and D must be released under section 551.022 of the Government Code. The information subject to section 552.022 in Exhibit S must also be released to the requestor. To the extent that the remaining information has not been seen by the potential opposing party, it may be withheld pursuant to section 552.103 of the Government Code. The information that has been seen by the potential opposing party may not be withheld under section 552.103 of the Government Code and must be released to the requestor.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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 challenge 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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/mcf

Ref: ID# 314654

Enc. Submitted documents

c: Mr. Charles B. Mitchell
306 West 7th Street, Suite 200
Fort Worth, Texas 76102-4905
(w/o enclosures)