



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 13, 2009

Ms. Amy Poe  
External Relations Coordinator/Public Information Officer  
North East Texas Workforce Board  
911 North Bishop Building A Suite 100  
Wake Village, Texas 75501

OR2009-01956

Dear Ms. Poe:

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# 334944.

The North East Texas Workforce Board (the "board") received a request for seven categories of information relating to LT Consulting, LLC ("LT"), a contract between the board and LT, a program identified as "Intensive Employment Services," and policies prohibiting discrimination and disparate treatment. You state that the board has no information that is responsive to parts of the request.<sup>1</sup> You also inform us that some of the requested information has been released. You have submitted information that the board seeks to withhold under section 552.103 of the Government Code. We have considered the exception

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<sup>1</sup>We note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. See *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

you claim and reviewed the submitted information, some of which consists of representative samples.<sup>2</sup> We also have considered the comments that we received from the requestor.<sup>3</sup>

We first note that some of the responsive information is not responsive to this request. Part one of the request seeks access to “[a] copy of the contract between the [board] and [LT,] including all liability and insurance policies, performance evaluation, [and] amendments.” You inform us that the board has neither possession of nor a right of access to LT’s insurance policies. Accordingly, the board is not required to release LT’s insurance policies 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). Nevertheless, you have submitted and seek to withhold the board’s insurance policies. You do not explain, however, and it is not otherwise clear to this office how the board’s insurance policies would be responsive to this request. Accordingly, we find that the board’s insurance policies are not responsive to the request. We also note that part 4 of the request authorizes the board to “blacken out the name or any personal information of the client[.]” Thus, we find that the requestor does not seek access to clients’ names and personal information, and therefore that information is not responsive to the request. We have marked the insurance policies and client information that are not responsive to this request. This decision does not address the public availability of the non-responsive information, and the board need not release that information in response to the request.

We next note that some of the responsive information falls within the scope of section 552.022 of the Government Code. 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 expressly confidential under other law or excepted from disclosure under section 552.108 of the Government Code. Gov’t Code § 552.022(a)(1). Section 552.022(a)(3) provides for required 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 responsive information includes a completed report that is subject to disclosure under section 552.022(a)(1) and information in accounts, vouchers, and a contract that is subject to section 552.022(a)(3). The board must release that information, which we have marked, unless it is expressly confidential under other law or unless information in the report encompassed by section 552.022(a)(1) is excepted from

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<sup>2</sup>This letter ruling assumes that the submitted representative samples of information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the board to withhold any information that is substantially different from the submitted information. *See* Gov’t Code §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

<sup>3</sup>*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).

disclosure under section 552.108.<sup>4</sup> Although you seek to withhold the information that is subject to section 552.022 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.) (governmental body may waive Gov't Code § 552.103); 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 expressly confidential for the purposes of section 552.022(a)(1) or section 552.022(a)(3). Thus, the board may not withhold any of the information that is subject to section 552.022 under section 552.103. Therefore, because the board claims no other exception to disclosure, and none of the information in question is expressly confidential under other law, the marked information that is subject to section 552.022 must be released in its entirety.

With respect to the rest of the responsive information, we address your claim under section 552.103. 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 [1<sup>st</sup> 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).

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<sup>4</sup>We note that the board does not raise section 552.108, the "law enforcement" exception.

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."<sup>5</sup> *Id.* You explain that the requestor had a contract with LT relating to programs administered by the board. You state that the requestor claims that he has not been paid for services rendered to three clients. You inform us that the requestor claims to have suffered damages in excess of \$75,000.00 and has informed the board that he has "no alternative but to pursue this matter in a court[.]" You contend that the board reasonably anticipated litigation with the requestor on the date of its receipt of this request for information. You state that the rest of the responsive information is related to the anticipated litigation. Based on your representations, the supporting documentation that you have submitted, and our review of the information in question, we conclude that the board may withhold the remaining responsive information under section 552.103.

In reaching this conclusion, we assume that the requestor has not seen or had access to any of the remaining information. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. Thus, if the opposing party has seen or had access to information relating to anticipated litigation, through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We 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: (1) the board must release the marked information that is subject to section 552.022 of the Government Code; and (2) the board may withhold the rest of the responsive information under section 552.103 of the Government Code.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and

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<sup>5</sup>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).

responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is written in a cursive style with a long horizontal stroke extending to the right.

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

JWM/cc

Ref: ID# 334944

Enc: Submitted documents

c: Requestor  
(w/o enclosures)