



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 5, 2009

Mr. Kevin D. Cullen
Cullen, Carsner, Seerden & Cullen, L.L.P.
P.O. Box 2938
Victoria, Texas 77902-2938

OR2009-10798

Dear Mr. Cullen:

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# 351277.

The Aransas County Commissioners Court (the "county"), which you represent, received a request for audio recordings and minutes of a specified meeting, as well as ten categories of information regarding communications of specified individuals. You claim that the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments from the requestor. *See Gov't Code § 552.304* (interested party may submit written comments concerning disclosure of requested information).

Initially, we note the requestor excluded from his request any individual's personal information, social security number, personal bank account information, date of birth, medical records, home address or telephone number, and personal cell phone number. Further, we note you have marked information in the submitted documents that we understand you to claim is nonresponsive to the present request for information, as it pertains to individuals other than those named by the requestor. Therefore, the information the requestor excluded from his request and the information you have marked is not responsive to the present request. The county need not release nonresponsive information in response to this request, and this ruling will not address that information.

Next, we note a portion of the submitted information is made expressly public under section 552.022 of the Government Code, which 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:

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3). In this instance, the submitted information contains cellular telephone bills that are subject to section 552.022(a)(3). Although you assert this information is excepted under section 552.103 of the Government Code, section 552.103 is a discretionary exception within the Act and not "other law" that makes information confidential. *See 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); 665 at 2 n. 5 (2000) (discretionary exceptions generally). Therefore, the cellular telephone bills, which we have marked, may not be withheld under section 552.103. However, we note some of the information in the cellular telephone bills may be protected under section 552.136 of the Government Code.¹ Because section 552.136 is other law for purposes of section 552.022, we will address this exception to disclosure.

Section 552.136 of the Government Code states "[n]otwithstanding any other provision of this chapter, 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). Accordingly, the county must withhold the cellular telephone account numbers we have marked in the cellular telephone bills under section 552.136 of the Government Code. As you have claimed no other exceptions to disclosure for the remaining information subject to section 552.022, this information must be released to the requestor.

Next, section 552.101 of the Government Code excepts from public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This exception encompasses information that other statutes make confidential. You raise section 552.101 in conjunction with section 551.104 of the Open Meetings Act, chapter 551 of the Government Code, which provides that "[t]he certified agenda or tape of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3)." *Id.* § 551.104(c). Thus, such information

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

cannot be released to a member of the public in response to an open records request.² See Open Records Decision No. 495 at 4 (1988). Additionally, minutes of a closed meeting are confidential. See Open Records Decision No. 60 (1974) (closed meeting minutes are confidential under predecessor to section 551.104); see also Open Records Decision Nos. 563 (1990) (minutes of properly held executive session are confidential under OMA); ORD 495 (information protected under predecessor to section 551.104 cannot be released to member of public in response to open records request). Accordingly, the county must withhold any responsive certified agenda, tape recording, or minutes of a closed meeting under section 552.101 of the Government Code in conjunction with section 551.104(c) of the Government Code.

We will now address your argument under section 552.103 of the Government Code for the remaining information not subject to section 552.022. Section 552.103 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). The county 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 is pending or reasonably anticipated on the date the county 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). The county must meet both prongs of this test for information to be excepted under section 552.103(a).

²We note that the county is not required to submit a certified agenda or tape recording of a closed meeting to this office for review. See Open Records Decision No. 495 at 4 (attorney general lacks authority to review certified agendas or tapes of executive sessions to determine whether a governmental body may withhold such information from disclosure under statutory predecessor to section 552.101 of the Government Code).

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 demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the potential opposing party threatening to sue on several occasions and hiring an attorney. *See* Open Records Decision No. 288 (1981).³ 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).

You state that prior to the requestor submitting the present request for information, the requestor's client "discussed litigation with both the Aransas County Attorney and the Aransas County Judge, had made a demand for settlement, had been terminated, had secured the services of an attorney, [and] threatened to hire another attorney[.]" You also indicate the requestor attempted to initiate settlement discussions with the county. Based on your representations and our review of the submitted information, we conclude you have shown that litigation was reasonably anticipated at the time the county received the present request. Further, you explain that the remaining information is related to the anticipated litigation. Upon review, we find that the county has demonstrated the remaining information is related to the anticipated litigation for purposes of section 552.103(a). Therefore, the county may withhold the remaining information under section 552.103 of the Government Code.

We note, however, that once information has been obtained by all parties to the anticipated 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 the anticipated 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 when the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

In summary, (1) the county must withhold the cellular telephone account numbers we have marked under section 552.136 of the Government Code; (2) the county must release the remaining information subject to section 552.022(a)(3) of the Government Code; (3) the

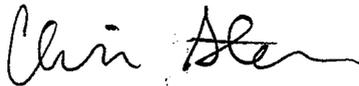
³In addition, this office has concluded that litigation was reasonably anticipated when the governmental body received a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party, *see* Open Records Decision No. 555 (1990); or when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); 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 threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

county must withhold any responsive certified agenda, tape recording, or minutes of a closed meeting under section 552.101 of the Government Code in conjunction with section 551.104(c) of the Government Code; and (4) the county may withhold the remaining 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 responsibilities, please visit our website at 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,



Christopher D. Sterner
Assistant Attorney General
Open Records Division

CDSA/eeg

Ref: ID# 351277

Enc. Submitted documents

c: Requestor
(w/o enclosures)

The Honorable Burt Mills
Aransas County Judge & Commissioners Court
301 North Live Oak
Rockport, Texas 78382
(w/o enclosures)