



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 20, 2009

Ms. Amy L. Sims
Assistant City Attorney
City of Lubbock
P.O. Box 2000
Lubbock, Texas 79457

OR2009-11686

Dear Ms. Sims:

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# 353197 (PIR# 283618).

The City of Lubbock (the "city") received a request for eight categories of information related to a proposed animal shelter. You claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.¹

Initially, we note some of the submitted information was created after the date the request for information was received by the city. Thus, this information, which we have marked, is not responsive to the request. This ruling does not address the public availability of the non-responsive information, and that information need not be released.

Next, we note that some of the submitted responsive information is subject to section 552.022(a)(1) of the Government Code, which provides:

¹We assume that, to the extent any additional responsive information existed when the city received the request for information, the city has released it to the requestor. If not, then the city must do so immediately. See Gov't Code §§ 552.006, 552.301, 552.302; Open Records Decision No. 664 (2000).

the following categories of information are public information and not excepted from required disclosure under [the Act] 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). The submitted information contains a completed report made for the city, which must be released under section 552.022(a)(1), unless the information is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law.² Section 552.103 of the Government Code is a discretionary exception to public 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 section 552.103); Open Records Decision No. 665 at 2 n.5 (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 city may not withhold the completed report under section 552.103 of the Government Code. However, we note that the completed report may be subject to section 552.101 of the Government Code.³ As section 552.101 can make information confidential that is otherwise subject to section 552.022(a)(1), we will consider the applicability of this exception to the completed report. We will also consider your argument under section 552.103 for the remaining information not subject to section 552.022.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. Section 191.004 of the Natural Resources Code provides:

- (a) Information specifying the location of any site or item declared to be a state archeological landmark under Subchapter D of this chapter is not public information.

²We note that the city did not claim section 552.108 as an exception to disclosure of the information at issue.

³The Office of the Attorney General will raise mandatory exceptions, such as section 552.101, on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

(b) Information specifying the location or nature of an activity covered by a permit or an application for a permit under this chapter is not public information.

(c) Information specifying details of a survey to locate state archeological landmarks under this chapter is not public information.

Nat. Res. Code § 191.004(a)-(c). We note that the information subject to section 552.022 consists of an archeological survey prepared by a contractor for the city under the authority of Texas Antiquities Permit No. 5262. Upon review, we find that the submitted information qualifies as "information specifying details of a survey to locate state archeological landmarks" for the purposes of section 191.004. Therefore, we conclude that the city must withhold the archeological survey under section 191.004(c) of the Natural Resources Code in conjunction with section 552.101 of the Government Code.

We next address your claim under section 552.103 of the Government Code for the information not subject to section 552.022. Section 552.103 provides in 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 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 governmental body 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 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). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

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 governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.⁴ Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). 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).

In this instance, you state and provide documentation showing that the city was involved in pending litigation before the 72nd District Court in Lubbock County, Texas. The documentation reveals that the suit was filed on June 11, 2009. However, you state that the city received the request for information on June 5, 2009. Thus, the city received the request before the lawsuit was filed and litigation was pending. Further, you have not proven that litigation was anticipated by the city prior to its receipt of the request for information. Thus, you have failed to establish that litigation was pending or reasonably anticipated when the city received the request for information. *See* Gov't Code 552.103(c) (litigation must be pending or reasonably anticipated at the time the governmental body receives the request for information). Accordingly, none of the remaining submitted information may be withheld under section 552.103.

In summary, the city must withhold the archeological survey under section 191.004(c) of the Natural Resources Code in conjunction with section 552.101 of the Government Code. The remaining responsive information must be released to the requestor.

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,

⁴Among 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).

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,



Cindy Nettles
Assistant Attorney General
Open Records Division

CN/dls

Ref: ID# 353197

Enc. Submitted documents

c: Requestor
(w/o enclosures)