



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

March 23, 2010

Mr. Adrian A. Spears II
Law Offices of William M. McKamie, P.C.
Attorney for City of Boerne
941 Proton Road
San Antonio, Texas 78258

OR2010-04050

Dear Mr. Spears:

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# 374552.

The City of Boerne (the "city"), which you represent, received a request for several categories of information pertaining to the city cemetery, including records regarding a specified incident. You claim that the submitted information is excepted from disclosure under sections 552.103, 552.106, and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we address your argument that the request for information is overly broad and requires the city to perform research to accommodate the request. We agree the Act does not require a governmental body to perform legal research. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). Nevertheless, a governmental body must make a good-faith effort to relate a request to information that is within its possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). Because you have submitted information for our review, we believe you have made a good faith effort to submit information responsive to the request. Therefore, we will address your arguments to withhold the submitted information.

Some of the submitted documents, which we have marked, are not responsive to the instant request for information because they were created after the date the request was received.

This ruling does not address the public availability of any information that is not responsive to the request and the city is not required to release that information in response to this request.

We note some of the responsive information consists of copies of city ordinances. Because laws and ordinances are binding on members of the public, they are matters of public record and may not be withheld from disclosure under the Act. *See* Open Records Decision Nos. 551 at 2-3 (1990) (laws or ordinances are open records), 221 at 1 (1979) (official records of governmental body's public proceedings are among most open of records). Therefore, the submitted city ordinances, which we have marked, must be released.

We also note some of the remaining responsive information is subject to section 552.022 of the Government Code, which provides in pertinent part:

(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). A portion of the remaining responsive information pertains to the receipt or expenditure of funds by the city that falls within the purview of section 552.022(a)(3). Therefore, the city may only withhold the information at issue if it is confidential under "other law." Although you raise section 552.103 for this information, this section is a discretionary exception to disclosure that protects the governmental body's interests and may be waived. *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); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). 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 subject to section 552.022 under section 552.103. However, we note some of the information subject to section 552.022 is excepted from public disclosure under section 552.136 of the Government Code, which is "other law" for purposes of section 552.022.¹ Thus, we will

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

consider the applicability of this exception to the information subject to section 552.022(a)(3). Additionally, we will address your arguments under sections 552.103, 552.106, and 552.107 for the information not subject to section 552.022.

Section 552.136 states that “[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). Section 552.136(a) defines “access device” as “a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to . . . obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument.” *Id.* § 552.136(a). Upon review, we conclude the bank account numbers and routing numbers we have marked must be withheld under section 552.136.² The remaining information subject to section 552.022 must be released.

We now turn to your arguments for the remaining responsive information not subject to section 552.022(a)(3) of the Government Code. 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). 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

²We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including bank account and routing numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

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).

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.* In Open Records Decision No. 638 (1996), this office stated that, when a governmental body receives a notice of claim letter, it can meet its burden of showing that litigation is reasonably anticipated by representing that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act (the "TTCA"), Civil Practice & Remedies Code, chapter 101, or an applicable municipal ordinance. If that representation is not made, the receipt of the claim letter is a factor we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established litigation is reasonably anticipated. *See* ORD 638 at 4.

You state, and provide documentation showing, the city received a notice of claim letter from an attorney who states he represents the family of an individual involved in the specified incident. The letter states it was sent to the city in compliance with the TTCA, and alleges the city is liable for personal injuries and property damage arising from the incident at issue. Based on your representations and our review, we conclude litigation was reasonably anticipated on the date the city received the request for information. We further find the submitted information relates to the anticipated litigation. Accordingly, section 552.103 is generally applicable to the remaining responsive information not subject to section 552.022(a)(3).

We note, however, the opposing party in the anticipated litigation has seen or had access to some of the information at issue. 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. Therefore, if the opposing party has seen or had access to information relating to 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). Thus, the information the opposing party in the anticipated litigation has seen or had access to may not be withheld under section 552.103. Except for those documents, which we have marked for release, the remaining responsive information that is not subject to section 552.022(a)(3) may be withheld at this time under section 552.103.³ We note the applicability of this exception

³As our ruling is dispositive, we need not address your remaining arguments against the disclosure of this information.

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 city must release the marked city ordinances. The city must release the information we have marked subject to section 552.022(a)(3) of the Government Code. In releasing this information, the city must withhold the information we have marked pursuant to section 552.136 of the Government Code. With the exception of the information we have marked for release, the city 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, toll free, at (888) 672-6787.

Sincerely,



Christina Alvarado
Assistant Attorney General
Open Records Division

CA/rl

Ref: ID# 374552

Enc. Submitted documents

cc: Requestor
(w/o enclosures)