



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 19, 2010

Mr. James Downes
Assistant County Attorney
Harris County Attorney's Office
2525 Holly Hall, Suite 190
Houston, Texas 77054

OR2010-10714

Dear Mr. Downes:

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# 387025 (CAO File No. 10HSP0314).

The Harris County Hospital District (the "district") received a request for 38 categories of information relating to the Martin Luther King, Jr. Health Clinic. You state that information responsive to categories one through four of the request either has been or will be released, subject to any redactions authorized by the previous determination issued in Open Records Decision No. 684 (2009).¹ You claim that the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the information you submitted.²

We first note that some of the submitted information was created subsequent to the date of the district's receipt of the instant request for information. The Act does not require a

¹We note that this office recently issued Open Records Decision No. 684, a previous determination to all governmental bodies authorizing them to withhold ten categories of information without the necessity of requesting an attorney general decision.

²This letter ruling assumes that the submitted "representative copies" of information are truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the district 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).

governmental body to release information that did not exist when it received a request or create responsive information.³ Thus, the submitted information that did not exist when the district received the instant request is not responsive to the request. This decision does not address the public availability of that information, which we have marked, and it need not be released to the requestor in response to the instant request.

Next, we address your claim under section 552.103 of the Government Code for the rest of the submitted information. 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 section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To meet this burden, a 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).*

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." *Id.* This office has concluded that a governmental body's receipt of a claim that it represents to

³*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).*

be in compliance with the notice requirements of the Texas Tort Claims Act (the "TTCA"), chapter 101 of the Civil Practice and Remedies Code, is sufficient to establish that litigation is reasonably anticipated. If this representation is not made, then the receipt of the claim letter is a factor that we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established that litigation is reasonably anticipated. *See* Open Records Decision No. 638 at 4 (1996).

You explain that the district is involved in a construction contract dispute with Matl Construction Corporation ("Matl") concerning a sum in excess of one million dollars. You state that the requestor is an attorney for Matl. You have submitted, as Exhibit C, a letter in which the requestor, on behalf of Matl, asserts a claim against the district for damages allegedly suffered by Matl. You state that Exhibit C constitutes notice of a claim under the TTCA. You contend that Exhibit C demonstrates that the district reasonably anticipates litigation. You also contend that the submitted responsive information is related to the litigation. We understand that the district received Exhibit C prior to its receipt of this request for information. Based on your representations, Exhibit C, and our review of the information at issue, we find that the responsive information is related to litigation that was reasonably anticipated on the date of the district's receipt of the instant request for information. We therefore conclude that the district may withhold the responsive information under section 552.103 of the Government Code.⁴

In reaching this conclusion, we assume that the opposing party in the anticipated litigation has not seen or had access to any 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. If the opposing party has seen or had access to information relating 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). We also 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).

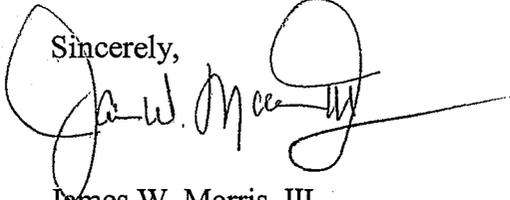
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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,

⁴As we are able to make this determination, we do not address your claims under sections 552.107 and 552.111 of the Government Code.

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,

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 line extending to the right.

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

JWM/tp

Ref: ID# 387025

Enc: Submitted documents

c: Requestor
(w/o enclosures)