



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 3, 2010

Mr. Richard L. Bilbie
Assistant City Attorney
City of Harlingen
P.O. Box 2207
Harlingen, Texas 78551

OR2010-16675

Dear Mr. Bilbie:

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# 399037.

The City of Harlingen (the "city") received a request for "documents related to Federal Aviation Administration, Texas Airports Development Office Complaint filed by Sun Valley Aviation, against the City of Harlingen Valley International Airport." You claim the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Section 552.103 of the Government Code 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 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.¹ 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 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).

This office has long held that for the purposes of section 552.103, "litigation" includes contested cases conducted in a quasi-judicial forum. *See, e.g.*, Open Records Decision Nos. 588 at 2 (1991); 474 at 5-6 (1987), 368 at 1-2 (1983), 336 at 1, 301 at 1-2 (1982). In determining whether an administrative proceeding is conducted in a quasi-judicial forum, this office has focused on the following factors: (1) whether the dispute is, for all practical purposes, litigated in an administrative proceeding where (a) discovery takes place, (b) evidence is heard, (c) factual questions are resolved, and (d) a record is made; and (2) whether the proceeding is an adjudicative forum of first jurisdiction, *i.e.*, whether judicial review of the proceeding in district court is an appellate review and not the forum for resolving a controversy on the basis of evidence. *See* ORD 588 at 4.

¹In addition, this office has concluded litigation was reasonably anticipated 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).

You inform us the requested information pertains to a complaint that Sun Valley Aviation has filed with the Texas Airports Development Office of the Federal Aviation Administration (the "FAA") against the city. Part 16 of title 14 of the Code of Federal Regulations governs all proceedings involving federally-assisted airports, except for certain disputes between U.S. and foreign air carriers and airport proprietors. 14 C.F.R. § 16.1(a). A person affected by any alleged noncompliance of relevant law may file a complaint with the FAA. *Id.* § 16.23(a). Before filing the complaint, however, the person affected by the alleged noncompliance must initiate and engage in good faith efforts to resolve the dispute informally. *Id.* § 16.21. After receiving the complaint, the FAA may dismiss the complaint, investigate the complaint, or issue an initial determination based on the partys' pleadings or information obtained by the FAA in its investigations. *Id.* §§ 16.25(a), 16.31(a). A complaint under part 16 may result in a hearing. Under section 16.202, a hearing officer has the following authority:

- (c) Issue subpoenas authorized by law and issue notices of deposition requested by the parties;
- (d) Limit the frequency and extent of discovery;
- (e) Rule on offers of proof;
- (f) Receive relevant and material evidence; [and]
- ...
- (k) Make findings of fact and conclusions of law, and issue an initial decision.

14 C.F.R. § 16.202 (c)-(f), (k). The hearing officer shall issue an initial decision based on the record developed during the proceeding and send this decision to the parties. *See id.* § 16.241(a). Each party adversely affected by the initial decision may appeal the decision to the Associate Administrator. *See id.* § 16.241(b). Pursuant to section 16.247, a party may seek judicial review of the Associate Administrator's final decision or order in a United States Court of Appeals. *See id.* § 16.247(a).

You indicate the city's airport is a federally assisted airport. You also indicate Sun Valley Aviation has filed an informal complaint with the FAA against the city. We understand that if the city is not able to resolve the complaint through an informal process, Sun Valley Aviation may seek redress through a formal complaint process regulated by part 16 of title 14 of the Code of Federal Regulations. You contend that, under these circumstances, the city reasonably anticipated litigation on the date of its receipt of the present request for information. You also contend the submitted information is related to the anticipated litigation. Based on your representations, we find the submitted information is related to litigation that was reasonably anticipated on the date of the city's receipt of this request for

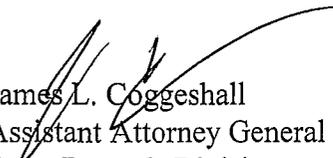
information. We therefore conclude the city may withhold the submitted information under section 552.103 of the Government Code.²

We note, however, once the information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (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, 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,



James L. Coggeshall
Assistant Attorney General
Open Records Division

JLC/tp

Ref: ID# 399037

Enc. Submitted documents

c: Requestor
(w/o enclosures)

²As our ruling is dispositive, we do not address your other arguments to withhold this information.