



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 18, 2010

Ms. Cary Grace
Assistant City Attorney
City of Austin
P.O. Box 1088
Austin, Texas 78767

OR2010-17493

Dear Ms. Grace:

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# 400620.

Austin Energy ("AE") received a request for all photographs, claims, and documents related to an incident in which an AE utility pole fell on the requestor's vehicle. You state AE has released a portion of the responsive records. You claim 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.

You claim the submitted information is subject to section 552.103 of the Government Code, which provides in relevant 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). A 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 was pending or reasonably anticipated on the date that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). 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 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 receiving this request for information, the requestor filed a claim for reimbursement for damages to his vehicle with AE. You state that because AE denied this claim, it reasonably anticipates litigation related to the submitted information. However, you do not provide, and the submitted information does not reveal, any concrete evidence showing the requestor actually threatened to file a lawsuit against AE or otherwise took any objective steps toward filing suit prior to AE’s receipt of the request. Accordingly, you failed to demonstrate AE reasonably anticipated litigation on the date the request was received, and AE may not withhold any information under section 552.103.

¹Among 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).

However, we note the submitted information may contain information subject to section 552.117 of the Government Code.² Section 552.117(a)(1) of the Government Code exempts from public disclosure the present and former home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that such information be kept confidential under section 552.024. Gov't Code § 552.117(a)(1). Additionally, section 552.117 encompasses personal cellular telephone numbers, provided the cellular telephone service is paid for by the employee with his or her own funds. *See* Open Records Decision No. 670 at 6 (2001) (extending section 552.117 exception to personal cellular telephone number and personal pager number of employee who elects to withhold home telephone number in accordance with section 552.024). Whether a particular piece of information is protected by section 552.117 must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). AE may only withhold information under section 552.117(a)(1) on behalf of employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made.

We marked an AE employee's cellular telephone number in the submitted information. If this cellular telephone number is the employee's personal cellular telephone number and the employee elected under section 552.024 to withhold his home telephone numbers, then this marked number must be withheld under section 552.117(a)(1) of the Government Code. If this AE employee did not timely elect to withhold this information, or if the marked cellular telephone number is not the employee's personal cellular telephone number, this number must be released.

The remaining information contains a private e-mail address that may be subject to section 552.137 of the Government Code. Section 552.137 exempts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body," unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). The e-mail address we marked is not specifically excluded by section 552.137(c). Accordingly, AE must withhold the e-mail address we marked under section 552.137 of the Government Code, unless the owner of the e-mail address affirmatively consents to its disclosure.³

²The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

³We note Open Records Decision No. 684 (2009) is a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including private e-mail addresses under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

In summary, if the cellular telephone number we marked is the AE employee's personal cellular telephone number and the employee timely elected under section 552.024 of the Government Code to withhold this information, then the cellular telephone number we marked must be withheld under section 552.117(a)(1) of the Government Code. AE must withhold the e-mail address we marked under section 552.137 of the Government Code, unless its owner consents to its disclosure. The remaining submitted information must be released.⁴

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,



Bob Davis
Assistant Attorney General
Open Records Division

RSD/tp

Ref: ID# 400620

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴We note the information being released contains information to which the requestor has a right of access as the individual whose information is at issue. See Gov't Code § 552.023(b) (governmental body may not deny access to person to whom information relates, or that person's representative, solely on grounds that information is considered confidential by privacy principles). Because such information may be confidential with respect to the general public, if AE receives another request for this information from a different requestor, AE must again seek a ruling from this office.