



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 22, 2010

Mr. G. William Fowler  
Attorney at Law  
3800 East 42nd Street, Suite 600  
Odessa, Texas 79762

OR2010-19327

Dear Mr. Fowler:

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# 403936.

The Southwest Texas Municipal Gas Corporation ("Southwest"), which you represent, received a request for eight categories of information pertaining to Southwest, including correspondence between board members for a specified period of time. You inform us Southwest does not have some of the requested information.<sup>1</sup> You indicate Southwest will make some of the requested information available to the requestor, but claim the submitted information is excepted from disclosure under sections 552.101, 552.102, and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note some of the information you have submitted to us for review is not responsive to the request for information because it was created after Southwest received the request for information. This ruling does not address the public availability of any

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<sup>1</sup>The Act does not require a governmental body to disclose information that did not exist when the request for information was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

information that is not responsive to the request, and Southwest is not required to release this information, which we have marked, in response to this request.

You assert the remaining information is excepted under section 552.103 of the Government Code, which 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.<sup>2</sup> Open

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<sup>2</sup>In 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. 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).

You assert the submitted information is excepted under section 552.103 because it “relate[s] to a decision by the [Southwest] Board of Directors . . . to terminate their General Manager and he has retained an attorney and made a demand for reinstatement of his position.” Based on your representations, our review, and the totality of the circumstances, we find the information at issue pertains to litigation that Southwest reasonably anticipated when it received the request for information. Our review of the records at issue also shows they are related to the anticipated litigation for purposes of section 552.103(a). Thus, section 552.103 is applicable to the submitted information.

We note, however, Southwest seeks to withhold information that the attorney representing the former manager, who is the potential opposing party to the anticipated litigation, has already seen or had access to. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that relates to the litigation through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). Thus, if the opposing party to anticipated litigation has already seen or had access to information that relates to the litigation, through discovery or otherwise, there is no interest in now withholding such information under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, the submitted information that the former manager or his attorney has already seen or had access to is not excepted under section 552.103. However, Southwest may withhold the remaining information under section 552.103.<sup>3</sup>

You assert the information that the former manager or his attorney has already seen or had access to is excepted under section 552.102 of the Government Code. Section 552.102(a) excepts from disclosure “information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” Gov’t Code § 552.102(a). Upon review, we find none of the information at issue is excepted under section 552.102(a) of the Government Code. Accordingly, none of the submitted information may be withheld on that basis.

You also claim this information is excepted under section 552.101 of the Government Code, which excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. However, you do

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Records Decision No. 288 (1981).

<sup>3</sup>As our ruling is dispositive, we do not address your other arguments to withhold this information.

not cite to any specific law, and we are not aware of any, that makes any portion of the submitted information confidential under section 552.101. *See* Open Records Decision No. 478 at 2 (1987) (statutory confidentiality requires express language making information confidential or stating information shall not be released to public). Therefore, we conclude Southwest may not withhold any portion of the information at issue under section 552.101 of the Government Code.

We note, however, that section 552.117 of the Government Code may be applicable to some of the information pertaining to the former manager that is not excepted under section 552.103.<sup>4</sup> Section 552.117(a)(1) excepts from disclosure the current 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 request this information be kept confidential under section 552.024 of the Government Code. Whether information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, Southwest may only withhold information under section 552.117 on behalf of the former employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. Such information may not be withheld for individuals who did not make a timely election. We have marked information that must be withheld if section 552.117 applies.

To conclude, Southwest must release the submitted information that the former manager or his attorney has already seen or had access to; however, in releasing this information, Southwest must withhold the information we have marked under section 552.117(a)(1) of the Government Code if the former manager timely elected to withhold that information. Southwest 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](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

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<sup>4</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987); *see, e.g.*, Open Records Decision No. 470 at 2 (1987) (because release of confidential information could impair rights of third parties and because improper release constitutes a misdemeanor, attorney general will raise predecessor statute of section 552.101 on behalf of governmental bodies).