



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 6, 2011

Mr. Ricardo R. Lopez
Attorney for North East Independent School District
Rogers, Morris & Grover, LLP
517 Soledad Street
San Antonio, Texas 78205-1508

OR2011-00368

Dear Mr. Lopez:

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# 405168.

The North East Independent School District (the "district"), which you represent, received a request for all documents relating to a specified project and named entities. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the claimed exception and reviewed the submitted information.

Initially, we note that some of the submitted information is subject to section 552.022 of the Government Code. This section provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure under [the Act] unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate[.]

Gov't Code § 552.022(a)(1), (3), (5). In this instance, the submitted information includes (1) completed reports made for the district, (2) signed contracts and invoices related to the expenditure of public funds by a governmental body, and (3) information used to estimate the expenditure of public funds by a governmental body. This information, which we have marked, is subject to sections 552.022(a)(1), (3), and (5), respectively. The completed reports must be released pursuant to section 552.022 unless they are confidential under section 552.108 or under "other law." The remaining marked information must be released unless it is confidential under "other law." You assert that this information is excepted from disclosure by section 552.103 of the Government Code. However, section 552.103 is a discretionary exception to disclosure that protects only the governmental body's interests and may be waived. *See id.* § 552.007; *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); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022(a). Therefore, the information we have marked may not be withheld on this basis. However, these documents contain information that is subject to section 552.136 of the Government Code, which does constitute other law for purposes of section 552.022.¹

Section 552.136 provides "[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). An access device number is one that may be used to "(1) obtain money, goods, services, or another thing of value; or (2) initiate a transfer of funds other than a transfer originated solely by paper instrument." *Id.* § 552.136(a). The documents we have marked as subject to section 552.022 contain bank account and bank routing numbers. We have marked this

¹ The Office of the Attorney General will raise a mandatory exception like section 552.136 on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

information that must be withheld under section 552.136.²

We next address your argument under section 552.103 against disclosure of the remaining information that is not subject to section 552.022. Section 552.103 of the Government Code provides, in relevant 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 has the burden of providing relevant facts and documents to show that the section 552.103(a) exception applies in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the requested information is related to that litigation. *See 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 parts of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

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 be in compliance with the notice requirements of the Texas Tort Claims Act

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

(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 assert that the district reasonably anticipates litigation pertaining to the requested information. You provide documentation showing that prior to receiving this request for information, the district received a notice of claim and demand letter from an attorney representing a subcontractor stating that the district's general contractor had not paid the subcontractor on the project that is the subject of the submitted information. The notice stated that if the account remained unpaid, the district could be held personally liable and a lien placed on the district's property, thus putting the district on notice of potential litigation, particularly as you state the district did not intend to pay the claim. You do not affirmatively represent to this office the requestor has made a claim against the district that is in compliance with the TTCA. However, after reviewing the submitted documentation and your arguments, we conclude, based on the totality of the circumstances, that the district reasonably anticipated litigation when it received the request for information. We also find that the remaining information is related to the anticipated litigation for purposes of section 552.103(a). We therefore conclude that the remaining information may generally be withheld under section 552.103.

We note, however, once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, a section 552.103(a) interest no longer exists as to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). The submitted information includes some documents that the requestor either provided to the district or has otherwise already seen. Information that has either been obtained from or provided to all other parties in the litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Furthermore, the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the district must release the documents we have marked under section 552.022 of the Government Code. In doing so, the district must withhold the information we have marked under section 552.136. With the exception of the information the requestor has already seen, the district may withhold the remaining information under section 552.103.

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,



Misty Haberer Barham
Assistant Attorney General
Open Records Division

MHB/eeg

Ref: ID# 405168

Enc. Submitted documents

c: Requestor
(w/o enclosures)