



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 28, 2011

Ms. Ruth H. Soucy
Deputy General Counsel for Open Records
Texas Comptroller of Public Accounts
P.O. Box 13528
Austin, Texas 78711-3528

OR2011-14068

Dear Ms. Soucy:

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# 431439 (Comptroller ID#s 7420483708 and 7462648129).

The Texas Comptroller of Public Accounts (the "comptroller") received two requests from the same requestor for (1) any records the comptroller has pertaining to when the Formula One race in Travis County will be held in 2012, (2) any records indicting the person or specific entity that has the authority to officially set the date of the specified race and whether such authority has been exercised, (3) any correspondence transmitted between the comptroller and the City of Austin or Circuit Event Local Organizing Committee since May 1, 2011, and (4) specified records concerning transfers from the Texas Major Events Trust Fund ("METF") and the Texas General Fund pertaining to the specified race. You state the comptroller has released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.103, 552.106, 552.107, and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹Although you raised sections 552.101 and 552.116 of the Government Code as exceptions to disclosure in your initial brief to this office, you did not submit to this office written comments stating the reasons why these sections would except the submitted information; we therefore assume you no longer assert these exceptions. *See* Gov't Code §§ 552.301, .302.

²We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and, therefore, does not authorize the withholding of, any other requested records to the extent those records contain substantially different types of information than that submitted to this office.

Initially, we note the requestor states his requests do not include records this office has previously ruled were not subject to disclosure under the Act. Thus, to the extent the submitted information was the subject of previous rulings issued by this office, this information is not responsive to the requests. This decision does not address the public availability of the non-responsive information and that information need not be released in response to the present requests.

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 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 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.* This office has also found litigation was reasonably anticipated where the opposing party threatened to sue on several occasions and hired an attorney. *See* Open Records Decision No. 288 (1981). 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 inform us, and provide documentation showing, a lawsuit was filed against the comptroller over the METF and the specified race before the comptroller received the instant requests for information. You state, and the submitted information reflects, the requestor was the attorney of record in that lawsuit. You also state the lawsuit resulted in a nonsuit without prejudice. Further, you state, and provide newspaper articles reflecting, the requestor publicly announced he could quickly re-file the lawsuit. You note the requestor made this announcement before his requests for information were received. Based on your representations and our review, we conclude the comptroller has established that litigation was reasonably anticipated when the comptroller received the requests for information. You state, and we agree, the submitted information is related to the anticipated litigation. Accordingly, we find the submitted information may be withheld under section 552.103 of the Government Code.³

We note, however, once information has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Also, the applicability of section 552.103(a) ends when the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 at 2 (1982); 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,



Kenneth Leland Conyer
Assistant Attorney General
Open Records Division

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³As our ruling is dispositive, we need not address your remaining arguments against disclosure.

Ref: ID# 431439

Enc. Submitted documents

c: Requestor
(w/o enclosures)