



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 11, 2011

Ms. Sharon Alexander
Associate General Counsel
Texas Department of Transportation
125 East 11th Street
Austin, Texas 78701-2483

OR2011-14705

Dear Ms. Alexander:

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# 432682.

The Texas Department of Transportation (the “department”) received a request for all correspondence between the department and Val Verde County (the “county”) relating to the county’s pass-through project during specified time frames.¹ You state you will release some information. You claim the remaining requested information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information. We have also received and considered comments submitted by the requestor’s attorney. *See* Gov’t Code § 552.304 (interested party may submit written comments regarding availability of requested information).

Initially, we note some of the submitted information is not responsive to the present request because it was created outside the specific time frames specified by the requestor. This ruling does not address the public availability of any information that is not responsive to this

¹We note the department sought and received clarification from the requestor regarding the request. *See* Gov’t Code § 552.222(b) (stating that if information requested is unclear to governmental body or if a large amount of information has been requested, governmental body may ask requestor to clarify or narrow request, but may not inquire into purpose for which information will be used).

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

Next, we note the requestor's attorney contends some of the requested information has been previously disclosed to the public. The Act does not permit the selective disclosure of information to the public. *See id.* §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). Information that has been voluntarily released to a member of the public by a governmental body may not subsequently be withheld from another member of the public by the same governmental body, unless public disclosure of the information is expressly prohibited by law or the information is confidential under law. *See Gov't Code* § 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988). However, the Act does not preclude a governmental body from invoking the Act's exceptions to protect from further public disclosure information which has been released on a limited basis through no official action, and against the wishes and policy of, the governmental body. *See Open Records Decision No. 387* (1983). We note the requestor's attorney states, "the documents sought are correspondence from [the department] to [the county]..., the release of which to the public was out of the hands of [the department] and about which [the department] would not necessarily be aware." The release of certain information by an entity other than the department does not constitute a voluntary release of information held by the department for purposes of section 552.007. Because the requestor's attorney does not assert the department released any of the information at issue and we have no indication any information was otherwise released by the department, we conclude section 552.007 is not applicable in this instance. Therefore, we will consider your arguments for the requested information.

We also note the requestor's attorney objects to the department submitting a representative sample of information in this instance. The Act allows a governmental body to submit a representative sample of the information it seeks to withhold if a voluminous amount of information was requested. *Gov't Code* § 552.301(e)(1)(D); *see also* Open Record Decision Nos. 499 at 6 (1988) (if documents requested are numerous and repetitive, governmental body should submit a representative sample), 497 at 4 (1988). The department states the submitted information is representative of the requested information.² Accordingly, we conclude the department has complied with the procedural requirements of the Act in submitting a representative sample of the information it seeks to withhold, and we will consider the department's arguments against the disclosure of the requested information.

Section 552.103 of the Government Code provides in part the following:

²This letter ruling assumes the submitted representative sample of information is truly representative of the requested information as a whole. This ruling does not reach, and therefore does not authorize, the withholding of any other requested information to the extent that the other information is substantially different than that submitted to this office. *See Gov't Code* §§ 552.301(e)(1)(D), .302; Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

(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 was pending or reasonably anticipated on the date of the receipt of the request for information and (2) the information at issue is related to the pending or anticipated 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 litigation is reasonably anticipated, the governmental body must furnish concrete evidence litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim 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.³ 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). Further, the fact that a potential opposing party has hired

³In addition, this office has concluded that 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).

an attorney who makes a request for information does not establish litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You inform us the department and the county entered into an agreement for the development and construction of a relief route on the state highway system. You contend the department reasonably anticipates litigation because prior to the date the request was received, the requestor filed a complaint with the department's Civil Rights office asserting allegations of discrimination by the county and the department regarding the relief route at issue. Further, the submitted information indicates this complaint has been forwarded to the Federal Highway Administration who is responsible for investigating alleged discrimination by the department. In this instance, the submitted complaint contains a letter from an attorney representing the requestor that informs the department "a demand letter in the amount of \$692,000 is in the process of being filed" and states that his client is "prepared to take other independent legal actions" to pursue payment. Based on these representations and our review, we find the department reasonably anticipated litigation on the date the request was received. You also state the submitted information relates to the development and construction of the relief route at issue. Based on your arguments and our review, we find the submitted information is related to the anticipated litigation. We therefore conclude the department may withhold the submitted information under section 552.103 of the Government Code.⁴

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). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, 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; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.

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

⁴As our ruling is dispositive, we need not address your remaining argument against disclosure.

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,

A handwritten signature in cursive script that reads "Kirsten Brew".

Kirsten Brew

Assistant Attorney General

Open Records Division

KB/em

Ref: ID# 432682

Enc. Submitted documents

c: Requestor
(w/o enclosures)