



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 16, 2011

Mr. Cass Robert Callaway  
City Attorney  
City of Venus  
P.O. Box 380  
Venus, Texas 76084

OR2011-16968

Dear Mr. Callaway:

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# 436467 (ORR# ORRTBPE07202011).

The City of Venus (the "city") received a request for information pertaining to three specified city projects. You state the city has no information pertaining to two of the specified projects.<sup>1</sup> 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. We have also received and considered comments from a representative of the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, the requestor argues some of the requested information has previously been released. The Act does not permit the selective disclosure of information. *See id.* §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). Section 552.007 of the Government Code provides if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold that exact information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See id.* § 552.007; Open Records Decision No. 518 at 3 (1989).

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<sup>1</sup>The Act does not require a governmental body that receives a request for information to create information that did not exist when the request was received. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983).

However, section 552.007 does not prohibit an agency from withholding similar types of information that are not the exact information that has been previously released. We note the requestor contends the city has already released “essentially the same records” on January 29, 2011. The requestor also states the city has released “virtually the same public records[.]” However, the requestor does not state the exact information at issue was released to a member of the public. Further, we have no indication the requested information has been released in its exact form to any member of the public. Accordingly, we find section 552.007 is inapplicable to the submitted information, and we will address the city’s argument against disclosure of the submitted information.

Next, the requestor contends the city failed to comply with section 552.301 of the Government Code in requesting a decision from this office. The city received the original request for information on July 20, 2011. You state the city requested clarification of the request. *See* Gov’t Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request). When a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed. *See City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010). We note section 552.301(c) states, “[f]or purposes of this subchapter, a written request includes a request made in writing that is sent to the officer for public information, or the person designated by that officer, by electronic mail or facsimile transmission.” *See id.* § 552.301(c). Further, the city’s request for clarification directs the requestor to provide a copy of “[a]ny and all correspondence regarding this matter . . . to the City Secretary, as she records and keeps track of open records requests. Our normal open records procedure requires a copy be sent to her, so she can maintain record and maintain a copy of the request, but also insure a timely response by tracking the request and fulfillment.” The requestor responded to the city’s request for clarification on August 16, 2011, by e-mail sent to the city’s attorney at his law offices, not to the officer for public information or her designee. Consequently, we find the city did not violate section 552.301 of the Government Code in requesting a decision from this office. *See generally* Gov’t Code § 552.301 (enumerating the responsibilities a governmental body incurs upon receipt of a written request for information that it wishes to withhold). Accordingly, we will determine whether the submitted information is exempted from disclosure.

Next, we note portions of the submitted information are subject to section 552.022 of the Government Code. This section provides, in pertinent part:

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

...

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

Gov't Code § 552.022(a)(3). In this instance, portions of the submitted information consist of invoices and information in a contract relating to the expenditure of public funds by a governmental body. This information must be released pursuant to section 552.022 unless it is confidential under other law. You seek to withhold the information at issue under section 552.103 of the Government Code. However, section 552.103 is a discretionary exception that protects a 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 Gov't Code § 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the information subject to section 552.022(a)(3), which we have marked, may not be withheld under section 552.103 of the Government Code. As you claim no other exception to the disclosure of the marked information, it must be released. However, we will consider your argument under section 552.103 for the information not subject to section 552.022(a)(3).

Section 552.103 of the Government Code 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 section 552.103(a) 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 the governmental body received the request for information, and (2) the information at issue 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551.

To establish 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." *See* Open Records Decision No. 452 at 4 (1986). 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. *See* Open Records Decision No. 555 (1990); *see also* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, or when an individual threatened to sue on several occasions and hired an attorney. *See* Open Records Decision Nos. 346 (1982), 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). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983).

In this instance, you assert the requestor, a director of compliance and enforcement with the Texas Board of Professional Engineers (the "board"), is investigating the city, city staff, each city council member, and the mayor for criminal and civil violations. You contend the city or any of its officials can be criminally prosecuted for violation of laws in the Texas Engineering Practice Act, chapter 1001 of the Occupations Code. You argue release of the submitted information "substantially interferes with their position of avoiding criminal liability." You further claim the city or its officials can be administratively penalized for violations of the Texas Engineering Practice Act. You argue an administrative proceeding under the Engineering Practice Act constitutes litigation for purposes of section 552.103. You argue "[l]itigation is certain in this matter as the [board's] staff and investigators and the [c]ity are at a standstill." However, you have not provided this office with evidence the board had taken any objective steps toward initiating litigation with the city prior to the date the city received the board's request for information. *See* Gov't Code § 552.301(e); Open Records Decision No. 331 (1982). Upon review, therefore, we find you have not established litigation was reasonably anticipated on the date the city received the request for information. Therefore, you have not demonstrated the applicability of section 552.103 of the Government Code to the information not subject to section 552.022(a)(3), and the city may not withhold the information at issue on that basis.

The remaining information includes information that is subject to section 552.136 of the Government Code.<sup>2</sup> Section 552.136 provides, "[n]otwithstanding any other provision of [the Act], 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). Section 552.136(a) defines "access device" as "a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means

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

of account access that alone or in conjunction with another access device may be used to . . . obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument.” *Id.* § 552.136(a). This office has determined insurance policy numbers are access device numbers for purposes of section 552.136. *See id.* § 552.136(a) (defining “access device”). Accordingly, the city must withhold the insurance policy number we have marked under section 552.136 of the Government Code.

In summary, the information we have marked must be released pursuant to section 552.022(a)(3) of the Government Code. The city must withhold the insurance policy number we have marked under section 552.136 of the Government Code. The remaining information must be released.

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 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,



Claire V. Morris Sloan  
Assistant Attorney General  
Open Records Division

CVMS/agn

Ref: ID# 436467

Enc. Submitted documents

c: Requestor  
(w/o enclosures)