



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 5, 2012

Mr. Bennett M. Wyse
Messer, Campbell & Brady, L.L.P.
For the City of Fate
6351 Preston Road, Suite 350
Frisco, Texas 75034

OR2012-00201

Dear Mr. Wyse:

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# 441483 (PIR F-037A).

The City of Fate (the "city"), which you represent, received a request for (1) construction plans approved by the city for specified drainage improvements, (2) any discrepancies between the construction plans and completed project provided to the city by the contractor, and (3) the video recording of the entire project corridor provided by the contractor prior to the commencement of construction. You state the city has no information responsive to item two of the request.¹ 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.

Initially, we must address the city's obligations under section 552.301 of the Government Code, which prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(e) requires the governmental body to submit to this office, not later than the

¹The 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 or to create information in response to a request. *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).

fifteen-business-day deadline after the date of its receipt of the request, (1) written comments stating why the governmental body's claimed exceptions apply to the information that it seeks to withhold; (2) a copy of the request for information; (3) a signed statement of the date on which the governmental body received the request or evidence sufficient to establish that date; and (4) the specific information that the governmental body seeks to withhold or representative samples if the information is voluminous. *See* Gov't Code § 552.301(e)(1)(A)-(D). You inform us the city received this request on October 17, 2011. Thus, the city was required to submit the information required by section 552.301(e) by November 7, 2011. Although you submitted some of the responsive records by the fifteen-business-day deadline, the responsive video recording was not submitted until November 9, 2011. Consequently, with respect to the video recording submitted in your November 9, 2011 correspondence, we find the city failed to comply with the procedural requirements of section 552.301.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(b) results in the legal presumption that the requested information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See id.* § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 150 (1977). Generally, a governmental body may demonstrate a compelling reason to withhold information by showing that the information is made confidential by another source of law or affects third party interests. *See* Open Records Decision No. 630 (1994). You assert the submitted information is excepted from disclosure under section 552.103 of the Government Code. Section 552.103 is a discretionary exception to disclosure and may be waived. *See* Gov't Code § 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 Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Because you have failed to comply with the procedural requirements of the Act, we find the city has waived its claim under section 552.103 for the video recording, which was not timely submitted, and the city may not withhold the submitted video recording under that exception. We will address your arguments under section 552.103 of the Government Code for the information that was timely submitted.

You raise section 552.103 of the Government Code for the remaining information, which provides in pertinent 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). 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). *See* ORD 551 at 4.

In order to demonstrate that litigation is reasonably anticipated, the governmental body must provide this office "concrete evidence showing that the claim that litigation might ensue is more than a mere conjecture." Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *Id.* We note that the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983). In Open Records Decision 638 (1996), this office stated that, when a governmental body receives a notice of claim letter, it can meet its burden of showing that litigation is reasonably anticipated by representing that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act (the "TTCA"), Civil Practice and Remedies Code, chapter 101, or an applicable municipal ordinance. If that representation is not made, the receipt of the claim letter is a factor we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established litigation is reasonably anticipated. *See* ORD 638 at 4. However, we note this office has found the fact that an opposing party hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly constituted an objective step toward litigation. *See* Open Records Decision No. 346 (1982).

You argue litigation is reasonably anticipated in this instance because the requestor, an attorney, submitted a notice of claims and demand letter on behalf of his clients, property owners, on April 21, 2011, and a supplemental demand letter on October 14, 2011, which

also included the instant request for information. The requestor's demand letters allege wrongful conduct by the city, constituting inverse condemnation of the requestor's clients' property, negligent design and construction of structures on said property, and common-law nuisance claims, including violation of the requestor's clients' constitutional rights as property owners. Based on your representations and our review, we find that you have established the timely submitted information is related to litigation the city reasonably anticipated on the date it received this request for information. Accordingly, we conclude that the city may withhold the information we have marked under section 552.103 of the Government Code.

Generally, 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. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

We note portions of the submitted video recording are subject to section 552.130 of the Government Code.² Section 552.130 excepts from public disclosure information relating to a driver's license or motor vehicle title or registration issued by an agency of this state or another state or country. Gov't Code § 552.130. We find the city must withhold the portions of the submitted video recording that depict discernible license plate numbers under section 552.130 of the Government Code.³

In summary, the city may withhold the information we have marked under section 552.103 of the Government Code. The city must withhold the portions of the submitted video recording that depict discernible license plate numbers under section 552.130 of the Government Code. The city must release the remaining information.

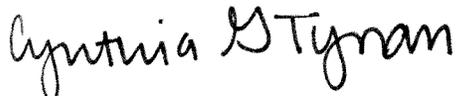
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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

³We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold specific categories of information without the necessity of requesting an attorney general decision, including the portion of a video depicting a discernible Texas license plate number under section 552.130 of the Government Code.

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,



Cynthia G. Tynan
Assistant Attorney General
Open Records Division

CGT/em

Ref: ID# 441483

Enc. Submitted documents

c: Requestor
(w/o enclosures)