



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 14, 2012

Mr. Steven H. Weller
Counsel for the El Paso Water Utilities
Public Service Board
Bickerstaff Heath Delgado Acosta, L.L.P.
Building One, Suite 300
3711 South Mopac Expressway
Austin, Texas 78746

OR2012-12796

Dear Mr. Weller:

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# 462044.

The El Paso Water Utilities Public Service Board (the "board"), which you represent, received two requests from the same requestor for nine specified categories of information pertaining to a specified incident and work site, a named company, and specified equipment. You inform us that the board will release some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted information. We also have considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that any person may submit comments stating why information should or should not be released).

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

¹Although you raise section 552.101 of the Government Code in conjunction with Texas Rule of Civil Procedure 192.5, this office has concluded that section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). In this instance, the proper exception to raise when asserting the work product privilege for information not subject to section 552.022 of the Government Code is section 552.111. *See* Open Records Decision Nos. 677 (2002), 676 at 1-2. Further, although you claim some of the submitted information is protected under the attorney work product privilege under section 552.107 of the Government Code, we note this section encompasses the attorney-client privilege, not the attorney work product privilege, and section 552.111 is the proper provision to address for your work product privilege claim based on the substance of your arguments and the nature of the information at issue.

(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.

See id. § 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 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 board must furnish concrete evidence that 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. *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).

You assert that prior to the date the board received the instant requests for information, an individual who suffered personal injuries while working for the board during the specified

incident hired an attorney to represent him. You inform us, and provide documentation showing, that this attorney notified the board of his representation of the individual at issue and requested documents related to this incident on two occasions prior to the board's receipt of these requests. You also inform us that the attorney's law firm has been involved in at least five other lawsuits against the board to demonstrate the willingness and capability of the attorney to initiate litigation against the board over the incident. Based on your representations, our review, and the totality of the circumstances, we find the board reasonably anticipated litigation on the date it received the requests for information. We further find the submitted information pertains to the substance of the anticipated litigation. Therefore, the board may withhold this information under section 552.103 of the Government Code.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 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

KLC/bhf

Ref: ID# 462044

Enc. Submitted documents

c: Requestor
(w/o enclosures)

²As our ruling is dispositive, we need not address your remaining argument against disclosure.