



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 16, 2012

Ms. Allison Bastian
Assistant City Attorney
City of Brownsville
1001 E. Elizabeth Street, Suite 234
Brownsville, Texas 78520

OR2012-18544

Dear Ms. Bastian:

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# 471247.

The City of Brownsville (the "city") received two requests for information regarding a proposed Federal Emergency Management Agency ("FEMA") safe shelter. You state the city does not have information responsive to a portion of the first request.¹ You state you will release some information responsive to the second request. 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 address your statement that information responsive to the request for FEMA's rules and regulations would be publicly available on FEMA's website. You do not indicate whether the city possesses or has a right of access to any information responsive to this portion of the request. The Act generally does not require a governmental body to obtain information not in its possession. *See* Open Records Decision Nos. 558 at 2 (1990) (Act not applicable if governmental body does not have right of access to or ownership of information

¹The Act does not require a governmental body to release information that did not exist when it received a request or to create responsive information. *See Economic 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), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

prepared for it by an outside entity), 445 at 2 (1986) (Act not applicable to information governmental body never possessed or was entitled to receive). However, a governmental body must make a good-faith effort to relate a request to any responsive information within its possession or control. Open Records Decision No. 561 at 8-9 (1990). We assume the city has made a good-faith effort to do so. Therefore, to the extent any information responsive to this portion of the request existed and was maintained by the city on the date the city received the request, we presume the city has released it. If not, the city must do so at this time. *See* Gov't Code §§ 552.301, .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to the requested information, it must release information as soon as possible).

Furthermore, section 552.228 of the Government Code requires a governmental body to provide a requestor with a "suitable copy" of requested public information. Gov't Code § 552.228(a). We also note "[a] public information officer does not fulfill his or her duty under the Act by simply referring a requestor to a governmental body's website for requested public information." Open Records Decision No. 682 at 7 (2005). Instead, section 552.221 of the Government Code requires a governmental body "to either provide the information for inspection or duplication in its offices or to send copies of the information by first class United States mail." *Id.*; *see* Gov't Code § 552.221(b). Thus, the city must provide access to or copies of the responsive information to the requestor; however, we note a requestor may agree to accept information on a governmental body's website in fulfillment of a request for information under the Act. *See* ORD 682 at 7.

You claim the submitted information is excepted under section 552.103 of the Government Code, which provides, in 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). A 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 (1) litigation is pending or

reasonably anticipated on the date the governmental body receives 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). 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.

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 that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that 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. Open Records Decision No. 555; *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 an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You state several residents of a neighborhood adjacent to the proposed FEMA shelter have contacted the city to voice their opposition to the proposed shelter. Additionally, after receiving the request for information from the first requestor, you sought and received confirmation from the first requestor that he represents some of the property owners and anticipates adding more property owners to the collective representation. However, you have not informed us the property owners have actually threatened litigation or otherwise taken any concrete steps toward the initiation of litigation. *See* ORD 331. Therefore, you have not established the city reasonably anticipated litigation when it received these requests for information. Consequently, the city may not withhold any of the submitted information under section 552.103 of the Government Code. Thus, as you have not claimed any other exceptions to disclosure, the city must release the submitted 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.

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,

A handwritten signature in cursive script, appearing to read "Kristi L. Wilkins".

Kristi L. Wilkins
Assistant Attorney General
Open Records Division

KLW/ag

Ref: ID# 471247

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)