



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 21, 2012

Mr. Roger E. Beecham
For Dallas County Water Control and Improvement District No. 6
Shannon, Gracey, Ratliff & Miller, L.L.P.
901 Main Street, Suite 4600
Dallas, Texas 75202

OR2012-20727

Dear Mr. Beecham:

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# 474605.

The Dallas County Water Control and Improvement District No. 6 (the "district"), which you represent, received a request for nineteen categories of information related to the district's operations. You state you do not maintain information responsive to category six.¹ You state you have redacted employees' dates of birth and social security numbers because this information is not responsive to the request. You claim that the submitted information is excepted from disclosure under sections 552.103, 552.104, 552.110, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.² We have also received and considered comments from the requestor. See Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we must address your assertion that category eighteen of the request would require the district to expend a burdensome amount of personnel hours in order to locate even a representative sample of that requested information. We note that administrative

¹In responding to a request for information under the Act, a governmental body is not required to disclose information that did not exist at the time 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).

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

inconvenience in responding to a request for information is not grounds for refusing to comply with a request under the Act. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976). A governmental body is required to make a good-faith effort to relate a request to responsive information that it holds or to which it has access. *See Open Records Decision No. 561 at 8 (1990)* (construing statutory predecessor). Moreover, if what information is requested is unclear or overly broad to a governmental body, a governmental body may ask the requestor to clarify the request or discuss with the requestor how the scope of the request might be narrowed. *See Gov't Code § 552.222(b)* (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). *See also City of Dallas v. Abbott*, 304 S.W.3d 380 (Tex. 2010) (holding when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). You do not inform us that the district has asked the requestor to clarify or narrow the scope of this category of the request. Therefore, to the extent any information responsive to category 18 of the request existed on the day the request was received, the district must release it. *See Gov't Code §§ 552.006, .221, .301, .302; Open Records Decision No. 664 (2000)*.

We also note you raise section 552.110 of the Government Code for a portion of the submitted information. Section 552.110 protects (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. *See Gov't Code § 552.110(a)-(b)*. We note this exception is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address the district's arguments under section 552.110 of the Government Code, and none of the submitted information may be withheld under this exception.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under [the Act] or other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;
- (2) the name, sex, ethnicity, salary, title, and dates of employment of each employee and officer of a governmental body;
- (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, con completion of the estimate;

...

(15) information regarded as open to the public under an agency's policies[.]

Id. § 552.022(a)(1)-(3), (5), (15). The submitted information contains a completed audit and completed reports that are subject to subsection 552.022(a)(1). The district must release the information subject to section 552.022(a)(1), which we have marked, pursuant to section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or is made confidential under the Act or other law. *See id.* § 552.022(a)(1). The submitted information also contains the salary, title, and dates of employment of district personnel, which is subject to section 552.022(a)(2) and a contract that is subject to section 552.022(a)(3), which the district must release unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(2)-(3). In addition, the submitted information contains budget information that constitutes information used to estimate the need for or expenditure of public funds and is subject to section 552.022(a)(5) and information regarded as open to the public under the district's policies that is subject to section 552.022(a)(15), which the district must release unless it is made confidential under the Act or other law. You seek to withhold the information subject to section 552.022 under section 552.103 of the Government Code. However, section 552.103 is a discretionary exception and does not make information confidential under the Act. *See 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 of the Government Code, which we have marked, may not be withheld under section 552.103 of the Government Code. As you raise no further exceptions against disclosure of the information subject to section 552.022(a)(1), section 552.022(a)(2), section 552.022(a)(5), and section 552.022(a)(15), the district must release this information pursuant to section 552.022 of the Government Code. However, you also claim section 552.104 of the Government Code for the contract subject to section 552.022(a)(3). We note information subject to section 552.022(a)(3) may be withheld under section 552.104(a). *See* Gov't Code § 552.104(b) (information protected by Gov't Code § 552.104 not subject to required public disclosure under Gov't Code § 552.022(a)). Accordingly, we will consider the applicability of section 552.104 to the submitted contract subject to section 552.022(a)(3).

You claim the information not subject to section 552.022 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.

Id. § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show section 552.103 is applicable in a particular situation. The test for meeting this burden is a showing (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.). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See Open Records Decision No. 551 at 4 (1990).*

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, and provide multiple affidavits from district employees and board members stating, that the district reasonably anticipates litigation with the City of Balch Springs (the "city"). You note the requestor is an attorney for the city. You have submitted minutes from several city council meetings indicating that, prior to the district's receipt of the instant request, the city council discussed issues involving the district during city council executive sessions. Additional city minutes submitted by the district indicate another city council

executive session, which was held on April 23, 2012, referenced general legal issues between the district and the city. You further state that since the date of the instant request for information, the district and the city attended a joint meeting where an attorney for the city generally discussed its "intent to assume the operations of [the district] by any means, including legal action." We note the joint meeting took place after the present request for information was received. In addition, the requestor asserts, and we agree, that any discussion of legal issues involving the district by the city council does not constitute an actual threat of litigation. Further, the requestor states, and we agree, the district has not provided our office with any evidence the city actually threatened litigation or otherwise took any concrete steps toward the initiation of litigation prior to the district's receipt of the instant request for information. See ORD 331. Therefore, we find you have not established the district reasonably anticipated litigation when it received the instant request for information. Consequently, the district may not withhold any of the information not subject to section 552.022 under section 552.103 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."³ Gov't Code § 552.101. Section 552.101 encompasses common-law privacy, which protects information that is highly intimate or embarrassing, such that its release would be highly objectionable to a person of ordinary sensibilities, and of no legitimate public interest. See *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both elements of the test must be established. *Id.* at 681-82. This office has found that personal financial information not related to a financial transaction between an individual and a governmental body is highly intimate or embarrassing and of no legitimate public interest. See Open Records Decision Nos. 600 at 9-10 (1992) (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history), 373 (1983). We conclude the information we have marked under common-law privacy constitutes highly intimate or embarrassing information of no legitimate public interest. As such, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The purpose of section 552.104 is to protect the purchasing interests of a governmental body in competitive bidding situations where the governmental body wishes to withhold information in order to obtain more favorable offers. See Open Records Decision No. 592 (1991).

³The 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).

Section 552.104 protects information from disclosure if the governmental body demonstrates potential harm to its interests in a particular competitive situation. *See* Open Records Decision No. 463 (1987). Generally, section 552.104 does not except bids from disclosure after bidding is completed and the contract has been executed. *See* Open Records Decision No. 541 (1990). You seek to withhold the marked contract, which you state is responsive to category nineteen of the request, under section 552.104. Upon review, we find you have failed to demonstrate the information at issue is related to a competitive matter for purposes of section 552.104(a) of the Government Code. Accordingly, the district may not withhold any of the submitted information under section 552.104 of the Government Code.

Section 552.117(a)(1) of the Government Code excepts from disclosure the home addresses and telephone numbers, emergency contact information, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Gov't Code §§ 552.117(a)(1), 024. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Therefore, the district may only withhold information under section 552.117(a)(1) on behalf of current or former officials or employees who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was made. To the extent the employees concerned timely elected to keep such information confidential under section 552.024 of the Government Code, the district must withhold the information we have marked under section 552.117 of the Government Code. To the extent the employees did not make timely elections, the district may not withhold the marked information on this basis.

Section 552.136(b) of the Government Code states that “[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). Accordingly, the district must withhold the bank account numbers and bank routing numbers we have marked under to section 552.136 of the Government Code.

In summary, the district must withhold the information we have marked under section 552.101 of the Government Code in conjunction with common-law privacy. To the extent the employees concerned timely elected confidentiality, the district must withhold the information we have marked under section 552.117(a)(1) of the Government Code. The district must withhold the bank account numbers and bank routing numbers we have marked under section 552.136 of the Government Code. The district must release the remaining information to the requestor.

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 black ink, appearing to read 'VB', followed by a horizontal line extending to the right.

Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/dls

Ref: ID# 474605

Enc. Submitted documents

c: Requestor
(w/o enclosures)