



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

February 5, 2013

Ms. Dorothy Palumbo
City Attorney
City of Galveston
P.O. Box 779
Galveston, Texas 77553-0779

OR2013-02071

Dear Ms. Palumbo:

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# 478144 (Galveston ORR #12-650).

The City of Galveston (the "city") received a request for all records related to the city's Hurricane Ike Housing Recovery Project and/or Community Development Block Grant disaster funds from January 1, 2009 through October 23, 2012. You state the city does not have some of the responsive information.¹ You state you will provide some of the requested information to the requestor. You claim the remaining requested information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code, and privileged under Texas Rule of Evidence 408. We have considered your arguments 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).

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

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.

Initially, we note some of the submitted information is not responsive to the instant request because it was created after the date the city received the request. We have marked this non-responsive information. This ruling does not address the public availability of any information that is not responsive to the request and the city is not required to release non-responsive information in response to the request.

We note the submitted information contains copies of city resolutions and ordinances. As laws and ordinances are binding on members of the public, they are matters of public record and may not be withheld from disclosure under the Act. *See* Open Records Decision Nos. 551 at 2-3 (1990) (laws or ordinances are open records), 221 at 1 (1979) (official records of governmental body's public proceedings are among most open of records). The submitted resolutions are analogous to an ordinance. Therefore, the city must release the submitted resolutions and ordinances.

We also note the submitted information contains the minutes of city council meetings. The minutes of a governmental body's public meetings are specifically made public under provisions of the Open Meetings Act, chapter 551 of the Government Code. *See* Gov't Code §§ 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying on request to governmental body's chief administrative officer or officer's designee), .041 (governmental body shall give written notice of date, hour, place, and subject of each meeting), .043 (notice of meeting of governmental body must be posted in place readily accessible to general public for at least 72 hours before scheduled time of meeting). Although you seek to withhold this information under sections 552.101 and 552.103, as a general rule, the exceptions to disclosure found in the Act do not apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Accordingly, the submitted city council meeting minutes must be released pursuant to section 551.022 of the Government Code.

Next, we address the requestor's comments to this office arguing that the city failed to comply with section 552.301(b) of the Government Code by not seeking a ruling from this office within ten business days of receiving his written request. *See* Gov't Code § 552.301(b). In this instance, the requestor contends, and the submitted information reflects, the city received the request for information on October 23, 2012. We understand the city requested clarification and narrowing on November 2, 2012, but the requestor did not respond to the clarification until November 9, 2012. *See id.* § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information). As we have no indication the city acted in bad faith in seeking clarification in this instance, we consider the city's ten-business-day period for requesting a decision under section 552.301(b) to have begun on November 9, 2012, the date the city received the requestor's response to the request for clarification and narrowing. *See City of Dallas v. Abbott*, 304 S.W.3d 380, 384 (Tex. 2010) (holding when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad 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). The city states it observed holidays on November 22 and 23, 2012. This office does not count any holidays, including skeleton crew days observed by a governmental body, as business days for the purpose of calculating a governmental body's deadline under the Act. Thus, the city's ten-business-day deadline was November 27, 2012. We note the city's submission to this office was postmarked within the ten-business-day deadline. *See* Gov't Code § 552.308 (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Accordingly, we find the city complied with section 552.301(b) of the Government Code.

The requestor further asserts the city failed to comply with the procedural requirements of section 552.301 of the Government Code by not including copies of Exhibits A, B, C, D, E, and G. Section 552.301(e-1) states a "governmental body that submits written comments to the attorney general . . . shall send a copy of those comments to the person who requested the information from the governmental body not later than the 15th business day after the date of receiving the written request." Gov't Code § 552.301(e-1). Exhibit A consists of the original request for information. Exhibit B consists of a notice invoking mediation filed by the requestor. Exhibit C is a copy of the e-mail for clarification of the records request sent by the city to the requestor. Exhibit D is a copy of the responses to the clarification e-mail sent by the city. Exhibit E is a copy of the notice and demand letter sent to the city by the attorney for the property owner claim. Exhibit G consists of e-mail correspondence between the city and the requestor regarding the arrangement of an informal meeting. Upon review, we find the requestor's receipt of the city's November 27, 2012 brief, which provides the substance of the city's arguments under sections 552.101 and 552.103, satisfies the statutory requirement under section 552.301(e-1). Thus, the city did not fail to comply with the procedural requirements set out in section 552.301(e-1).

The requestor also asserts the city failed to comply with sections 552.221(a) and 552.221(d) of the Government Code. *See id.* § 552.221(a) (requiring governmental body's officer for public information to promptly produce public information), 552.221(d) (providing that if officer of public information cannot produce information for inspection or duplication within 10 business days after date information is requested, the officer shall certify that fact in writing to requestor and set date and hour within reasonable time when information will be available for inspection or duplication). We note that while section 552.302 provides failure to comply with section 552.301 results in the presumption that the requested information is subject to required public disclosure and must be released, the Act contains no comparable provision for a violation of section 552.221(a) or section 552.221(d). *See id.* § 552.302. Thus, even if the city failed to comply with section 552.221(a) or section 552.221(d), as the requestor alleges, the city has not waived its discretionary or mandatory exception. Accordingly, we will consider the city's arguments against disclosure of the submitted information.

We next note that some of the submitted information falls within the scope of 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 this chapter 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; [and]

...

(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)(1), (3). The responsive information at issue includes completed reports that are subject to subsection 552.022(a)(1). The city must release the completed reports pursuant to subsection 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or are made confidential under the Act or other law. *See id.* § 552.022(a)(1). The responsive information at issue also contains contracts, promissory notes, a paid check issued by the city, and performance bond and insurance documents that are executed agreements pertaining to the receipt of funds by the city, and are therefore subject to subsection 552.022(a)(3). These documents must be released unless they are made confidential under the Act or other law. You seek to withhold the information subject to section 552.022 under sections 552.101 and 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 section 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, none of the information subject to section 552.022, which we have marked, may be withheld under section 552.103 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Evidence are “other law” within the meaning of section 552.022. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will address your argument under rule 408 of the Texas Rules of Evidence. Furthermore, because section 552.101 of the Government Code makes information confidential, we will consider the applicability of this exception to the information subject to section 552.022. We will also consider your argument under section 552.103 of the Government Code for the information not subject to section 552.022 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.” Gov't

Code § 552.101. This exception encompasses information other statutes make confidential. You claim section 552.101 in conjunction with section 154.073 of the Civil Practice and Remedies Code, which provides in part:

(a) [A] communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

(b) Any record made at an alternative dispute resolution procedure is confidential.

Civ. Prac. & Rem. Code § 154.073(a)-(b). You claim the mediation process began on October 23, 2012 when the requestor sent the Notice of Invoking Mediation to the city, and that “any documents produced as part of the pending mediation are confidential.” You have not explained, however, how or why any of the responsive documents at issue constitute “communication[s] . . . made by a participant in an alternative dispute resolution procedure” so as to be encompassed by section 154.073(a). Civ. Prac. & Rem. Code § 154.073(a). Likewise, you have not demonstrated the documents at issue constitute a “record made at an alternative dispute resolution procedure[.]” so as to fall within the scope of section 154.073(b). *Id.* § 154.073(b). Thus, we conclude you have not demonstrated the information at issue is confidential under section 154.073 of the Civil Practice and Remedies Code. Therefore, the city may not withhold any of the information at issue on that basis under section 552.101 of the Government Code.

Rule 408 of the Texas Rules of Evidence governs the admissibility of information developed through compromise negotiations. *See* TEX. R. EVID. 408. However, rule 408 does not expressly make information confidential. *See generally* Open Records Decision Nos. 658 at 4 (1998) (stating that statutory confidentiality provision must be express and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (stating that, as general rule, statutory confidentiality requires express language making information confidential), 465 at 4–5 (1987). Accordingly, the city may not withhold any of the information at issue under rule 408 of the Texas Rules of Evidence.

We turn next to the remaining information at issue that is not subject to section 552.022. Section 552.103 of the Government Code provides:

(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 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).

To establish that litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” See Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. See *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.³ Open Records Decision No. 555 (1990); see Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that 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 contend the city reasonably anticipated litigation at the time of the request because it is currently in a dispute with the requestor concerning the requestor’s performance, as well as the requestor’s payment, for work related to the city’s Disaster Housing Recovery Program

³In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, see Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, see Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, see Open Records Decision No. 288 (1981).

(the "program"). You state the city and the requestor are required by contract to engage in alternative dispute resolution before litigation may begin. You have provided a copy of the requestor's Notice of Invoking Mediation received by the city prior to the receipt of the instant request for information. You further state the information at issue pertains to the underlying dispute regarding the program. Based on your representations and our review, we find the information at issue is related to litigation the city anticipated on the date of its receipt of the request for information. Accordingly, the city may withhold the remaining requested information under section 552.103 of the Government Code.

However, once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, the city must release the submitted: (1) city resolutions and ordinances, (2) minutes of the city council meetings pursuant to section 551.022 of the Government Code, and (3) information subject to section 552.022 of the Government Code. The city may withhold the remaining information under section 552.103 of the Government Code.

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,



Britni Fabian
Assistant Attorney General
Open Records Division

BF/dls

Ref: ID# 478144

Enc. Submitted documents

c: Requestor
(w/o enclosures)