



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 27, 2013

Mr. John S. Schneider
First Assistant City Attorney
City of Pasadena
P.O. Box 672
Pasadena, Texas 77501-0672

OR2013-16848

Dear Mr. Schneider:

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# 500637 (ORR No. SL1329).

The City of Pasadena (the "city") received a request for information related to the excavation of a city easement at a specified address, and any other litigation or claim against the city since 1995 for damages to buried lines, meters, or apparatus due to the excavation of a city easement. 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 note you have not submitted any information pertaining to other litigation or claims against the city for damages due to the excavation of a city easement during the specified time period. Therefore, to the extent information responsive to this aspect of the request exists, we assume you have released it to the requestor. *See* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible). If you have not released any such information, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body,” unless it is excepted by section 552.108 of the Government Code or “made confidential under [the Act] or other law[.]” *Id.* § 552.022(a)(1). The information in Exhibit 3, including the submitted audio recording, consists of a completed report by the city’s claims adjuster that is subject to section 552.022(a)(1) and must be released unless it is either excepted under section 552.108 of the Government Code or confidential under the Act or other law. Although you assert this information is excepted from disclosure under section 552.103, this section is discretionary 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); Open Records Decision No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the city may not withhold Exhibit 3 and the submitted audio recording under section 552.103. As you raise no further exceptions to disclosure of this information, it must be released. However, we will address the applicability of section 552.103 to the remaining information, which is not subject to section 552.022.

Section 552.103, which provides, in relevant part, the following:

(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 that the section 552.103(a) exception applies in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the requested information 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, orig. proceeding); *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 parts 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 that litigation is reasonably anticipated, the governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* This office has concluded, when a governmental body receives a notice of claim letter, it can meet its burden of showing that litigation is reasonably anticipated by representing 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. Open Records Decision No. 638 (1996).

You state, and the submitted records reflect, the city received a claim letter from the requestor's client prior to receiving the present request for information. You state the claim letter complies with the TTCA. Based upon these representations and our review, we conclude the city anticipated litigation at the time the city received the present request. We also agree the submitted information is related to the anticipated litigation for the purposes of section 552.103. Accordingly, we conclude section 552.103 is generally applicable to the submitted information not subject to section 552.022 of the Government Code.

We note, 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 the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. We note the opposing party has seen or had access to a portion of the submitted information. Therefore, this information, which we have marked, is not protected by section 552.103 and may not be withheld on that basis. Thus, with the exception of the information seen by the opposing party to the anticipated litigation, which we have marked, the city may withhold the remaining submitted information not subject to section 552.022 under section 552.103. We note the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, with the exception of the information seen by the opposing party to the anticipated litigation, which we have marked, the city may withhold the submitted

information not subject to section 552.022 under 552.103 of the Government Code. The remaining information must be released.¹

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.texasattorneygeneral.gov/open_orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Britni Fabian
Assistant Attorney General
Open Records Division

BF/dls

¹We note the information being released contains the requestor's client's driver's license number, which is excepted from public disclosure under section 552.130 of the Government Code; his client's utility account number, which is excepted under section 552.136 of the Government Code; his client's e-mail address, which is excepted under section 552.137 of the Government Code; and his client's social security number. The requestor has a right of access to his client's driver's license, account and social security numbers under section 552.023 of the Government Code and to his client's e-mail address under section 552.137(b). *See Gov't Code §§ 552.023(a), .137(b); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual requests information concerning himself).* We note the city is authorized to redact the requestor's driver's license number under section 552.130(c) and his account number under section 552.136(c) without the necessity of requesting a decision under the Act. *See Gov't Code §§ 552.130(c)-(e), .136(c)-(e).* We also note Open Records Decision No. 684 (2009) is a previous determination issued by this office authorizing all governmental bodies to withhold an e-mail address of a member of the public under section 552.137 without requesting a decision. Additionally, section 552.147(b) authorizes a governmental body to redact a living person's social security number from public release without requesting a decision. Thus, should the city receive another request for the submitted information from a different requestor, the city is authorized to withhold the requestor's client's driver's license number, account number, e-mail address, and social security number without requesting another ruling.

Ref: ID# 500637

Enc. Submitted documents

c: Requestor
(w/o enclosures)