



Office of the Attorney General
State of Texas

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OR98-0329

Dear Gentlemen:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 112257.

The North Texas Municipal Water District (the "district"), which you represent, received a request for all information concerning a proposed landfill near Melissa, Texas. The requestor lists nineteen specific categories of information that he wishes to be included in the request. You argue that the information related to the proposed landfill is excepted from disclosure by sections 552.103, 552.105, and 552.111 of the Government Code. You have submitted a sample of the documents you seek to withhold.¹ The requestor also seeks eight other categories of information that do not appear related to the proposed landfill. You raise no exception to disclosure for this information. We presume, therefore, that this information has been released.

You first claim that the requested information about the proposed Melissa landfill may be withheld under section 552.103. When asserting section 552.103(a), a governmental body must establish that the requested information relates to pending or reasonably

¹In reaching our conclusion here, we 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.

anticipated litigation.² Thus, under section 552.103(a), a governmental body's burden is two-fold. The governmental body must establish that (1) litigation is either pending or reasonably anticipated, and that (2) the requested information relates to that litigation. *See 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 (1990) at 4.

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 (1986) at 4. 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 (1989) at 5 (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). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4.

You argue that the district anticipates that its application for a permit to construct the proposed landfill will be contested. You state that such a contested case will take place before the State Office of Administrative Hearings. You indicate that meetings have been held by local opponents to the landfill and several newspaper articles show that opposition exists. We do not believe, in this case, that you have demonstrated that litigation is reasonably anticipated. You may not withhold any of the requested records based on section 552.103.

²Section 552.103(a) excepts from required public disclosure information:

(1) relating to litigation of a civil or criminal nature or settlement negotiations, 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; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

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).

You next argue that portions of the information sought in categories 1, 2, and 3 may be withheld under section 552.105 of the Government Code. Section 552.105 excepts from disclosure information relating to:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Section 552.105 is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. Open Records Decision Nos. 564 (1990), 357 (1982), 310 (1982). Information excepted under section 552.105 that pertains to such negotiations may be excepted so long as the transaction is not complete. Open Records Decision No. 310 (1982). Because this exception extends to "information pertaining to" the location, appraisals, and purchase price of property, it may protect more than a specific appraisal report prepared for a specific piece of property. Open Records Decision No. 564 (1990) at 2. For example, this office has concluded that appraisal information about parcels of land acquired in advance of others to be acquired for the same project could be withheld where this information would harm the governmental body's negotiating position with respect to the remaining parcels. *Id.* A governmental body may withhold information "which, if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" Open Records Decision No. 357 (1982) at 3 (quoting Open Records Decision No. 222 (1979)). When a governmental body has made a good faith determination that the release of information would damage its negotiating position with respect to the acquisition of property, the attorney general will accept that determination unless the records or other information show the contrary as a matter of law. Open Records Decision No. 564 (1990).

You argue that information concerning the district's real property transactions may be withheld. You have marked the portions of the documents that you believe are protected by section 552.105, the location, maps, and purchase information of the real property. You advise this office that the "site of the proposed landfill has not been officially publicly announced." You also explain that

[r]elease of [the] information relating to [the] property acquisition would be harmful to the [d]istrict because the NTMWD is in the process of acquiring additional tracts of land to complete the land acquisition program for the proposed landfill. If this information is released before all of the land for the landfill is acquired, there could be an adverse effect on the NTMWD's ability to acquire the needed additional land. Premature disclosure may also affect the price NTMWD must pay for this property. The NTMWD is still in the process of acquiring land for the landfill project.

After examining your arguments and the marked information you have submitted, we find that section 552.105 is applicable in this instance. You may withhold the information you have marked under section 552.105.

You finally argue that some of the requested materials may be withheld under section 552.111. Section 552.111 excepts "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions, however, do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. Open Records Decision No. 615 (1993) at 5-6. In addition, section 552.111 does not except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5. While some of the information pertains to the policy functions of the district, some of the information contained in these documents is purely factual. We have marked those portions of the documents that may be withheld from required public disclosure under section 552.111. The remaining information must be released.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Don Ballard
Assistant Attorney General
Open Records Division

JDB/ch

Ref: ID# 112257

Enclosures: Marked documents

cc: Mr. Gene Zwillenberg
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(w/o enclosures)