



May 3, 2002

Ms. Ann-Marie P. Sheely
Assistant County Attorney
Travis County
P.O. Box 1748
Austin, Texas 78767

OR2002-2338

Dear Ms. Sheely:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 162279.

The Travis County Transportation and Natural Resources Department (the "county") received a request for the field inspection reports for a septic system being installed at a specified address. You claim that the requested 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 that the submitted documents include information that is subject to required public disclosure under section 552.022 of the Government Code, which provides in relevant part:

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under 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[.]

Gov't Code § 552.022(a)(1). The submitted documents include completed reports. Therefore, as prescribed by section 552.022, the county must release such information unless it is confidential under other law. Section 552.103 of the Government Code is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not other law that makes information expressly confidential for purposes of

section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103). Therefore, the completed reports we have marked may not be withheld under section 552.103 of the Government Code and must be released to the requestor.

We next consider the county's section 552.103 claim for the remaining submitted information. Section 552.103 provides as follows:

(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.

A governmental body has the burden of providing relevant facts and documents to show that 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, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas 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). Contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation under section 552.103. Open Records Decision No. 588 at 7 (1991). To demonstrate that litigation is reasonably anticipated, the county must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

The county appears to be an authorized agent of the Texas Natural Resource Conservation Commission with general authority over the location, design, construction, installation, and proper functioning of on-site sewage facilities as prescribed by chapter 366 of the Health and Safety Code. *See Health & Safety Code* § 366.011; 30 T.A.C. § 285.10. As an authorized agent, the county is charged with investigating complaints and taking appropriate and timely enforcement action in accord with section 285.71 of title 30 of the Texas Administrative Code, which may include administrative enforcement under the authority of chapter 7 of the

Water Code. *See* 30 T.A.C. §§ 30.33, 285.71. Section 7.303 of the Water Code provides the grounds on which the county may suspend or revoke an on-site sewage facility installer's license. *Id.*; *see also* 30 T.A.C. § 285.61 (installer required to possess an installer license and to construct an on-site sewage facility to meet the criteria required by the permitting authority). Proceedings conducted under chapter 7 of the Water Code are subject to the Administrative Procedure Act. Water Code § 7.306.

You have submitted documents that show the county has served the installer in this case with a notice of violation, and has warned the installer that the county will take enforcement action as authorized by statute if the installer does not remedy the violation. Having reviewed the arguments and submitted information, we conclude that you have shown that litigation is reasonably anticipated under section 552.103 and that the information relates to the anticipated litigation.

We note, however, that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). It appears that the installer has obtained or has had access to many of the documents submitted for our review. Thus, information that has either been obtained from or provided to all opposing parties in pending litigation is not excepted from disclosure under section 552.103(a), and must be disclosed. The remaining submitted information, however, may be withheld under section 552.103. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the completed reports we have marked are expressly made public by section 552.022(a)(1) of the Government Code and must be released to the requestor. We determine that litigation is reasonably anticipated and the submitted information relates to that litigation. Therefore, with the exception of information that has been obtained by or provided to all opposing parties in the anticipated litigation, the county may withhold the remaining submitted information under section 552.103.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the

governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/sdk

Ref: ID# 162279

Enc: Submitted documents

c: Ms. Ann Hoffman
9040 Elroy Road
Del Valle, Texas 78617
(w/o enclosures)