



July 15, 2002

Ms. Kimberly A. Frost
Vinson & Elkins, L.L.P.
One American Center, Suite 2700
600 Congress Avenue
Austin, Texas 78701-3200

OR2002-3855

Dear Ms. Frost:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 165563.

The Port of Houston Authority (the “authority”) received three requests for information relating to the authority’s acquisition of real property in the City of Seabrook (the “city”). You state the authority has made available portions of the information sought in the third request, consisting of copies of the authority’s contracts with lobbyists. You claim, however, that portions of the requested information are excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered your arguments and reviewed the submitted information.

We first address a procedural issue. Under section 552.2615, a request is considered to have been withdrawn by the requestor if the requestor does not respond in writing to a section 552.2615 itemized statement within ten days after the statement is sent to the requestor. You state that on May 8, 2002, you sent the requestor an itemized statement of the cost to provide copies of the material responsive to the first request since the charge for the information requested would exceed \$40. You state that the requestor had not responded to the itemized statement as of June 7, 2002. Consequently, the first request for information is withdrawn by operation of law. *See Gov’t Code 552.2615(b)*. Accordingly, the Public Information Act (the “Act”) does not require the authority to produce to the requestor any information responsive to the first request. *See id.*

We next address the questions you raise with respect to the information that you do not seek to withhold. We understand that you have made available to the requestor all of the information responsive to the second request, and a portion of the material sought in the third

request as clarified by the city on May 9, 2002, but that the requestor has not exercised its right to inspect this material within the ten days specified by statute. Neither has the requestor responded to an e-mail you sent May 16, 2002, asking whether the requestor would like copies of the requested documents mailed to it, rather than faxed as requested, since the documents were too voluminous to fax. You question whether the requestor's failure to respond to this e-mail has resulted in a withdrawal similar to that in the first request.

The Act generally distinguishes between providing access to or copies of requested information. *See* Open Records Decision No. 668 (2000). The Act requires a governmental body to promptly produce requested information for inspection, duplication, or both. *See* Gov't Code § 552.221; Open Records Decision No. 664 (2000). An officer for public information complies with section 552.221 by either providing the information for inspection or duplication, or by mailing copies of the information to the requestor if the person requesting the information specifies that copies be provided and pays postage and other charges. Gov't Code § 552.221(b)(1), (2). Here, the requestor has requested copies of the information at issue, and not to inspect this information. Moreover, as you did not send an itemized statement detailing estimated charges with respect to the information sought in the second and third parts of the request, section 552.2615 does not operate to effect a withdrawal of these parts of the request. The Act contains no other provision for the withdrawal of a request by operation of law in these or any other circumstances. You state, and provide documentation showing, that "a motion to pursue the City's Third Request failed to pass when presented to city council." You also state that the requestor did not respond within ten days to your notice that certain information had been made available for inspection. However, because the requestor has not affirmatively communicated to the authority its intent to withdraw any part of the second or third request, we cannot conclude that the requestor has withdrawn any part of these requests. We advise that if you are unclear about what information the requestor seeks, the Act permits you to clarify with the requestor whether it indeed continues to seek this information. In the event that it does, you must make this information available to the requestor immediately. *See* Gov't Code §§ 552.221(a); 552.228(a) (it shall be a policy of a governmental body to provide a suitable copy of public information within a reasonable time after the date on which the copy is requested). Open Records Decision No. 664 (2000).

You claim that the information you submitted to this office as responsive to the third request is excepted from disclosure under section 552.103 of the Government Code. Section 552.103(a) 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.

A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a two-prong 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 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 588 (1991). Further, litigation must be pending or reasonably anticipated on the date the requestor applies to the public information officer for access. Gov't Code § 552.103(c).

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 at 4 (1986). 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 (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). Nor does the mere fact that an individual hires an attorney and alleges damages serve to establish that litigation is reasonably anticipated. Open Records Decision No. 361 at 2 (1983). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

You cite various newspaper articles, letters, and e-mail messages which you state indicate that the city is planning its lawsuit against the authority. Moreover, you refer us to three prior rulings from this office in which we ruled that litigation was reasonably anticipated with respect to the Bayport Project, and state that the requested information “is on the same subject as the previous Attorney General rulings” allowing the authority to withhold this information.¹ Accordingly, we agree that you have shown that litigation is reasonably anticipated. *See* Open Records Decision No. 638 (1996). Furthermore, we find that the requested information relates to the anticipated litigation. Thus, the authority may withhold the information from disclosure under section 552.103, with the following exceptions.

Generally, 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). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted

¹ These rulings, Open Records Letter Nos. 2001-4914 (2001), 2000-1197 (2000), and 2000-3841 (2000), address requests for information related to the Bayport Project, a project undertaken by the authority “to plan, design, and construct a container terminal at the Bayport shipping channel.”

from disclosure under section 552.103(a), and it must be disclosed. 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). As we resolve your request under section 552.103, we need not consider your other claimed exceptions.

To summarize, as the first request has been withdrawn by operation of law, the authority need not respond to it. The authority must promptly produce the information responsive to the second and third requests for which the authority does not seek a ruling from this office. Based on section 552.103, the authority may withhold from disclosure the remainder of the information subject to the third request.

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,



V.G. Schimmel
Assistant Attorney General
Open Records Division

VGS/sdk

Ref: ID# 165563

Enc: Submitted documents

c: Mr. Bo McDaniel
City Manager
1700 First Street
Seabrook, Texas 77586
(w/o enclosures)