



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

December 12, 2002

Mr. Richard L. Muller, Jr.  
Vinson & Elkins, L.L.P.  
2300 First City Tower  
1001 Fannin Street  
Houston, Texas 77002-6760

OR2002-7083

Dear Mr. Muller:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 173533.

The Sienna Plantation Levee Improvement District of Fort Bend County, Texas (the "district") received a request for seven categories of information related to a pending lawsuit against the district. 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.<sup>1</sup> We have also considered the comments submitted by the requestor. *See* Gov't Code § 552.304 (providing for submission of public comments).

We first note that some of submitted information is made expressly public under section 552.022 of the Government Code. Section 552.022 provides, in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, 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:

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<sup>1</sup>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.

(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)(3).

A report relating to the district's financial status is expressly public under section 552.022(a)(3). Therefore, you may only withhold this information from disclosure if it is excepted under section 552.108 or is confidential under other law. You do not argue that the submitted information is excepted under section 552.108. Although you argue that the submitted information is excepted under section 552.103 of the Government Code, section 552.103 is a discretionary exception and therefore is not "other law" for purposes of section 552.022.<sup>2</sup> We note, however, the information subject to section 552.022(a)(3) includes information subject to section 552.136. Section 552.136 provides as follows:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value; or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code §552.136. We have marked the information that the district must withhold from disclosure under section 552.136. Accordingly, with the exception of the information we have marked that is subject to section 552.136, you must release this document to the requestor.

Further, we note that section 551.022 of the Government Code expressly provides that the "minutes and tape recordings of an open meeting are public records and shall be available for public inspection and copying on request to the governmental body's chief administrative

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<sup>2</sup>Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 665 at 2 n.5 (2000) (governmental body may waive litigation exception, section 552.103), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

officer or the officer's designee." In addition, section 551.041 of the Government Code also makes meeting agendas public. These are public records pursuant to the Open Meetings Act. Gov't Code §§ 551.022, .041. Generally, exceptions to disclosure cannot apply to information made public by statute. See Open Records Decision Nos. 623 (1994), 478 (1987), 451 (1986). Therefore, the district must release to the requestor the requested meeting agendas and minutes, which we have marked.

We turn now to your section 552.103 arguments for the remainder of the submitted information. 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).

In this case, you state that the request "seeks certain documents relating to a pending lawsuit against the District styled: *John Reed and Company, Inc. v. LJA Engineering & Surveying, Inc., Sienna Plantation Levee Improvement district of Fort Bend County Texas and Sienna/*

*Johnson North, L.P.*, in the 157<sup>th</sup> Judicial District Court of Harris County, Texas, Cause No. 2002-41617.” You further state that the district “has already participated in mediation of this matter,” and you explain the relationship between the various requested categories of information and the pending litigation. Based on our review of your arguments and the submitted information, we conclude that litigation was pending on September 19, 2002, the date the district received the request for information, and that the submitted documents relate to the pending litigation for purposes of section 552.103(a). *University of Tex. Law Sch.*, 958 S.W.2d at 483.

The requestor asserts that “[t]he requested documents have already been disseminated to third parties.” In this regard, we note that if the opposing party in the litigation has seen or had access to any of the information in these records, there is no section 552.103(a) interest in withholding that information from the requestor.<sup>3</sup> Open Records Decision Nos. 349 (1982), 320 (1982). Otherwise, you may withhold the remaining submitted information from disclosure under section 552.103.

In summary, under sections 552.022(a)(3), 551.022, and 551.041 the district must release to the requestor the documents we have marked, with the exception of information in those documents that we have marked under section 552.136. The remaining information may be withheld from disclosure under section 552.103 unless the opposing party has seen or had access to the information.

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

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<sup>3</sup> In addition, the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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# 173533

Enc: Submitted documents

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(w/o enclosures)