



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

February 13, 2003

Mr. Mike Willatt
Willatt & Flickinger
2001 North Lamar
Austin, Texas 78705

OR2003-0978

Dear Mr. Willatt:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 176457.

The South Texas Water Authority (the "authority"), which you represent, received a request for ten categories of information related to the authority's liability insurance coverage, a 1981 water supply contract with the City of Kingsville, and the authority's annual budgets. You advise that the authority is not aware of the existence of any documents responsive to one of the categories of information requested.¹ You claim that the remaining requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and have reviewed the submitted representative samples of information.²

First, we note that the documents at issue include the minutes of public meetings. The minutes, tape recordings, and agendas of a governmental body's public meetings are specifically made public by statute. See Gov't Code § 551.022. When a statute expressly makes information public and mandates the release of the information, that information cannot be withheld from disclosure under one of the exceptions in Subchapter C of chapter 552 of the Government Code. Open Records Decision Nos. 451 (1986) (specific statute that affirmatively requires release of information at issue prevails over litigation

¹ The Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

² We assume that the "samples" of records submitted to this office are 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 those submitted to this office.

exception of Public Information Act), 378 (1983), 221 (1979) (board minutes of school district cannot be excepted under statutory predecessor to section 552.103 under any imaginable circumstances), 161 (1977), 146 (1976). Accordingly, the authority must release the submitted public meeting minutes. Gov't Code § 551.022.

Further, we note that some of the information for which you claim the litigation exception is subject to section 552.022. Section 552.022(a) enumerates categories of information that are public information and not excepted from required disclosure under chapter 552 of the Government Code unless they are expressly confidential under other law. Certain information responsive to items 1 and 8 of the request fits into the subsection (3) category for "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body." Further, information responsive to items 9 and 10 of the request falls into the subsection (5) category for "working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate." Section 552.103, which serves to protect a governmental body's position in litigation, is a discretionary exception and does not make information confidential for purposes of section 552.022(a)(3) or (a)(5). *See* Open Records Decision Nos. 551 (1990) (section 552.103 does not itself make information confidential), 522 at 4 (1989) (discretionary exceptions in general). Therefore, the information subject to sections 552.022(a)(3) and (a)(5), which we have marked, must be released.

We now address your claim under section 552.103 with respect to the submitted information not made expressly public under section 551.022 or section 552.022. 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.

Gov't Code § 552.103(a), (c). Section 552.103 was intended to prevent the use of the Public Information Act as a method of avoiding the rules of discovery in litigation. Attorney General Opinion JM-048 at 4 (1989). The litigation exception enables a governmental body

to protect its position in litigation by requiring information related to the litigation to be obtained through discovery. Open Records Decision No. 551 at 3 (1990). A governmental body that raises section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of the exception to the information that it seeks to withhold. To show that the litigation exception is applicable, the authority must demonstrate that (1) litigation was pending or reasonably anticipated on the date it received the request and (2) the information at issue is related to that litigation. See Gov't Code § 552.103(a), (c); see also *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).

You indicate that the authority is a defendant in a currently pending civil lawsuit. You have provided a copy of the plaintiff's original petition in the lawsuit, styled *Romeo L. Lomas and W.A.T.E.R. v. South Texas Water Authority* and filed in October 2002 in the 105th Judicial District Court in Kleberg County. The lawsuit involves alleged overcharges to the City of Kingsville for water supplied under a 1981 water supply contract, and challenges the authority's interpretation of the contract, which was amended in 1983. We find that the authority has established that civil litigation was pending when it received this request for information. Further, we conclude that you have demonstrated that the information at issue relates to the pending litigation. Therefore, the authority may withhold the information under section 552.103. We note 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). Thus, information that has either been obtained from or provided to the opposing parties in a pending lawsuit is not excepted from disclosure under section 552.103(a), and 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).

In summary, you must release the submitted minutes of public meetings in accordance with section 551.022 of the Government Code. You must release the information that is subject to section 552.022. The remaining information may be withheld under section 552.103 of the Government Code.

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).

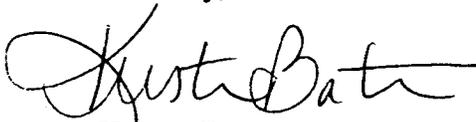
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



Kristen Bates
Assistant Attorney General
Open Records Division

KAB/seg

Ref: ID# 176457

Enc. Submitted documents

c: Mr. Robert Wilson, III
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(w/o enclosures)