



OFFICE of *the* ATTORNEY GENERAL  
GREG ABBOTT

March 5, 2003

Mr./Ms. Loren R. Smith  
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Attorneys at Law  
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333 Clay Street  
Houston, Texas 77002

OR2003-1430

Dear Mr./Ms. Smith:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 177434.

The City of Hunter's Creek Village (the "city") received a request for twenty-three categories of information related to a particular zoning case. 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 section 552.301 of the Government Code prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(e) provides in part that "[a] governmental body that requests an attorney general decision . . . must . . . not later than the 15<sup>th</sup> business day after the date of receiving the written request [for information] . . . submit to the attorney general . . . a copy of the specific information requested, or submit representative samples of the information if a voluminous amount of information was requested[.]" Gov't Code § 552.301(e)(1)(D). Section 552.302 provides that "[i]f a governmental body does not request an attorney general decision as provided by Section 552.301 . . . the information requested in writing is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information."

You assert that the city has submitted to this office "representative samples of the responsive documents." However, you have not submitted any documents that relate to items 7 or 9-23 of the request, all of which specifically pertain to the requestor's client. Based on the significant discrepancy between the specific information requested and the contents of the records that you submitted, we conclude that the submitted records do not constitute a representative sample of the responsive information that the city seeks to withhold. See Gov't Code § 552.301(e)(1)(D); Open Records Decision No. 497 at 4 (1988). Consequently, to the extent that the submitted records are not genuinely representative of responsive information held by the city, the city has failed to comply with section 552.301, and therefore requested information that differs substantially from the submitted records is presumed to be public. Gov't Code § 552.302. You contend that the requested information is excepted under section 552.103 of the Government Code. However, section 552.103 is a discretionary exception under the Public Information Act (the "Act") that does not constitute a compelling reason sufficient to overcome the presumption that the requested information is public. 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); Open Records Decision No. 473 at 2 (1987) (discretionary exceptions under Act can be waived). Accordingly, to the extent that it exists, the city must release responsive information that it holds that differs substantially from the submitted information.

We next note that the submitted information contains recorded minutes and an agenda of public meetings of the city's Board of Adjustment (the "Board"). 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 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; see Open Records Decision Nos. 451 (1986) (specific statute that affirmatively requires release of information at issue prevails over litigation 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 city must release the submitted public meeting minutes and agenda. Gov't Code §§ 551.022, 551.041.

You contend that section 552.103 of the Government Code excepts from public disclosure the remaining submitted information, which consists of a letter from the city notifying a property owner of a variance granted by the Board. 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). The city 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 on the date the governmental body receives the request, 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). The city must meet both prongs of this test for information to be excepted under 552.103(a).

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.<sup>1</sup> 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). 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).

In this case, you state that the Board heard a request for a variance on December 9, 2002, and denied the requested variance in a decision dated December 12, 2002. Furthermore, you state that the requestor filed suit in District Court in Harris County and that the city is a party to that suit. However, you acknowledge that the petition in that suit was not filed until December 16, 2002, three days after the date of the request for information.<sup>2</sup> Thus, we find that you have failed to establish that litigation was either pending or reasonably anticipated on the date that the city received the request for information. We therefore conclude that no portion of the submitted information is excepted from disclosure under section 552.103. Therefore, we conclude that all of the submitted information must be released to the requestor.

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

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<sup>1</sup>In 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).

<sup>2</sup>We note that you did not provide this office with any evidence as to the date that the city received the request. *See* Gov't Code § 552.301(e)(1)(C). We therefore assume that the city received the request on the date of the request, December 13, 2002.

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

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§ 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,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/jh

Ref: ID# 177434

Enc. Submitted documents

c: Mr. Joseph O. Slovacek  
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(w/o enclosures)