



OFFICE of the ATTORNEY GENERAL  
GREG ABBOTT

April 8, 2003

Mr. Jerry White  
General Manager  
Bexar-Medina-Atascosa Counties Water Control and Improvement District No. 1  
P.O. Box 170  
Natalia, Texas 78059

OR2003-2367

Dear Mr. White:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 179051.

The Bexar-Medina-Atascosa Counties Water Control and Improvement District No. 1 (the "district") received a request for (1) the names and addresses of all people to whom the district sent letters concerning possible unlawful structures and septic systems claimed to be on district land and (2) the names and addresses of other persons similarly situated that the district intends to contact. You claim that the information that is responsive to part 1 of the request is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and have reviewed the information you submitted. We also have considered the written comments that we received from the requestor. *See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

We note that the district has not requested a decision with respect to any information held by or available to the district that may be responsive to part 2 of this request for information. We therefore assume that the district has released any such information, to the extent that it existed on the date of the district's receipt of this request. If the district has not done so, then it must release any such information at this time. *See* Gov't Code §§ 552.301, .302; Open Records Decision No. 664 (2000). Chapter 552 of the Government Code does not require the district to release information that did not exist when it received this request or to create responsive information. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

You claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code. This exception provides in part:

(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). A governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) that the information at issue is related to that litigation. *See 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 [1<sup>st</sup> Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

To establish that litigation is reasonably anticipated for purposes of section 552.103, a governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *See* Open Records Decision No. 452 at 4 (1986). When the governmental body is the prospective plaintiff in the anticipated litigation, the concrete evidence must at least reflect that litigation involving a specific matter is "realistically contemplated." *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (investigatory file may be withheld if governmental body's attorney determines that it should be withheld pursuant to section 552.103 and that litigation is "reasonably likely to result"). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986).

In this instance, you inform us that the district has taken appropriate steps to pursue a lawsuit under the federal Clean Water Act, section 1365 of title 33 of the United States Code, against individuals who are believed to be illegally trespassing on district land. You also state, and

have provided documentation demonstrating, that the district has sent notice letters under section 1365 to the individuals that the district anticipates suing, as well as to the Attorney General of the State of Texas and the federal Environmental Protection Agency.<sup>1</sup> Based on your representations and the submitted documentation, we find that you have demonstrated that the district reasonably anticipated litigation on the date of its receipt of this request for information. *See* Gov't Code § 552.103(c). As the requested information consists of the names and addresses of the individuals to whom the district has sent the notice letters, we also find that the requested information relates to the anticipated litigation. *See id.* § 552.103(a). Therefore, we conclude that you have demonstrated that section 552.103 is applicable in this instance.

We note that the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). Thus, if all opposing parties to anticipated litigation have seen or had access to information relating to the litigation, through discovery or otherwise, then there is no interest in withholding that information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). In this instance, the information at issue is contained in the district's notice letters under section 1365. You indicate that the prospective opposing parties were notified of the anticipated litigation by letters sent separately to each such party. You do not indicate, and it does not otherwise appear to this office, that any of these letters was sent to all of the prospective opposing parties to the anticipated litigation. Therefore, we conclude that the district may withhold all of the notice letters at this time under section 552.103. We note that the applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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

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<sup>1</sup>We note that notice to the prospective opposing party is a condition precedent to the commencement of a lawsuit under section 1365. *See* 33 U.S.C. § 1365(b).

general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

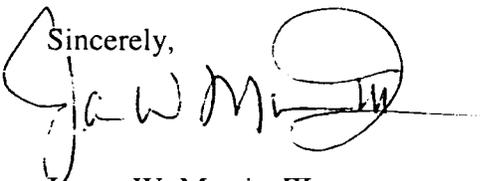
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Dep't of Pub. 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,

A handwritten signature in black ink, appearing to read "J W Morris III". The signature is written in a cursive style with a large, circular flourish at the end.

James W. Morris, III  
Assistant Attorney General  
Open Records Division

JWM/sdk

Ref: ID# 179051

Enc: Submitted documents

c: Mr. Ted R. Kenyon  
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(w/o enclosures)