



OFFICE *of the* ATTORNEY GENERAL  
GREG ABBOTT

May 5, 2003

Mr. Anthony S. Corbett  
Freeman & Corbett, L.L.P.  
2304 Hancock, Suite 6  
Austin, Texas 78756

OR2003-2997

Dear Mr. Corbett:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 180466.

The Brushy Creek Municipal Utility District (the "district") received two requests for the following information:

February 18, 2003 request:

1. A list of names and addresses of all people who live or have lived within the areas served by the Brushy Creek MUD from January 2002 to the present.
2. Please produce all correspondence, reports and test results to and from the TNRCC related to the issue of Trihalomethanes and Haloacetic Acids in the water that is delivered to people in the [district] from January 2002 to the present.
3. Any internal documents, reports and handwritten notes and e-mails from January 2002 to the present that discuss the issue of Trihalomethanes and Haloacetic Acids in the water that is delivered to people through [the district].
4. All correspondence, reports and test results to and from the Brazos River Authority from January 2002 to the present that discuss Trihalomethanes and Haloacetic Acids in the water that is delivered to people through [the district].

5. All correspondence, reports and test results to and from the LCRA from January 2002 to the present that discuss Trihalomethanes and Haloacetic Acids in the water that is delivered to people through [the district].

6. All correspondence, reports and test results to and from the City of Round Rock from January 2002 to the present that discuss Trihalomethanes and Haloacetic Acids in the water that is delivered to people through [the district].

7. All internal and external correspondence, reports, test results, e-mails, memos, and handwritten notes that relate to the medical and physical effects on human beings of drinking water with Trihalomethanes and Haloacetic Acids in it.

February 24, 2003 request:

1. Produce all documents that would show where and when the [district] has had sewer line breaks from January 1999 to the present.

2. Produce all internal and external correspondence, reports, test results, raw data, e-mails, memos, handwritten notes and computer files related to communications with the Environmental Protection Agency regarding trihalomethanes and haloacetic acids in the [district]'s potable water system.

3. Produce all documents and maps that would show the locations of the discharge points from which the [district] obtains the wastewater that it treats using its own facilities.

4. Produce all documents that would show any warning letters, citations, fines or penalties the [district] has received from any state or federal agency regarding the quality of its potable water and the quality of its sewage treatment system from January 1999 to the present.

5. Please produce all documents and maps that would show what river systems and lakes the [district] discharges wastewater into once it is treated and the locations at which this treated wastewater enters the rivers and lakes.

You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.137 of the Government Code. We have considered the exceptions 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 district has submitted to this office "representative samples" of the responsive information. However, you have not submitted any documents that relate to items 2 or 4-6 of the February 18, 2003 request, which specifically pertain to correspondence, reports, and test results to and from particular regulatory entities, nor to items 1-5 of the February 24, 2003 request, which specifically pertain to the district's water and wastewater systems. 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 district 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 district, the district has failed to comply with section 552.301, and therefore the 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 sections 552.101, 552.103, 552.107, and 552.137 of the Government Code. However, sections 552.103 and 552.107 are discretionary exceptions under the Public Information Act (the "Act") that do 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 Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 473 at 2 (1987) (discretionary exceptions under Act can be waived). Because you have not submitted the information, we have no basis for determining whether a compelling reason exists for withholding it under sections 552.101 or 552.137. Accordingly, to the extent that it exists, the district must release responsive information that it holds that differs substantially from the submitted information. See Gov't Code § 552.352. If you believe the information is confidential and may not lawfully be released, you must

challenge the ruling in court as outlined below. We caution that the distribution of confidential information constitutes a criminal offense. *See* Gov't Code § 552.352.

You contend that section 552.103 of the Government Code excepts from public disclosure the submitted information. 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 governmental body 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, 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 governmental body 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). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). In Open Records Decision No. 638 (1996), this office stated that a governmental body has met its burden of showing that litigation is reasonably anticipated when it received a notice of claim letter and the governmental body represents that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act ("TTCA"), Civ. Prac. & Rem. Code, ch. 101, or an applicable municipal ordinance. If a governmental body does not make this representation, the claim letter is a factor that this office will consider in determining whether a governmental body has established that litigation is reasonably anticipated based on the totality of the circumstances.

In this instance, you have enclosed a letter from the requestor as proof of anticipated litigation. This letter notifies the district that the requestor represents a named individual who has been injured and implies that the injury was the result of the district's negligence. You do not represent that this letter is in compliance with the TTCA or an applicable municipal ordinance. However, the letter on its face purports to be a "Notice of Claims Under Tort Claims Act Section 101.101," and makes a demand for "damages up to the maximum limits allowed by law." We have reviewed the letter and your arguments and conclude, based on the totality of the circumstances, that litigation was reasonably anticipated on the date the district received the request for information. We also find that the submitted information is related to the anticipated litigation for purposes of section 552.103(a). We therefore conclude that this information may be withheld from disclosure at this time pursuant to section 552.103.<sup>1</sup>

Generally, however, 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 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).

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

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<sup>1</sup>As section 552.103 is dispositive, we do not address your other arguments.

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,



Cindy Nettles  
Assistant Attorney General  
Open Records Division

CN/seg

Ref: ID# 180466

Enc. Submitted documents

c: Mr. Daniel R. Castro  
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(w/o enclosures)