



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

September 18, 2003

Ms. Celina Romero
Clark, Thomas & Winters, P.C.
P.O. Box 1148
Austin, Texas 78767

OR2003-6581

Dear Ms. Romero:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 187848.

The Uvalde County Underground Water Conservation District (the "district"), which you represent, received a request for (1) five categories of information relating to a contract with a named individual and (2) any lobbying and/or government relations contracts entered into by the district with any person or entity from January 1, 2001 through July 1, 2003. You inform this office that the district has released some of the requested information. You claim, however, that the responsive information encompassed by item 4 of the request is excepted from disclosure under sections 552.101, 552.103, and 552.107 of the Government Code.¹ We have considered the exceptions you claim and have reviewed the information you submitted.²

Section 552.101 of the Government Code excepts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This exception encompasses information that another statute makes confidential. Section 551.104 of the Open Meetings Act, chapter 551 of the Government

¹Item 4 requests "any information pertaining to [the named individual] and or [a named entity] . . . including, but not limited to, all tapes, electronic recordings and notes and transcriptions of any form of any meeting held in executive session at which the employment of [the named individual], or termination of [the individual's] contract with the [district] was in any way discussed[.]"

²This letter ruling assumes that the submitted representative sample of information is truly representative of the requested information as a whole. This ruling neither reaches nor authorizes the district to withhold any information that is substantially different from the submitted information. See Gov't Code § 552.301(e)(1)(D); Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988).

Code, makes a certified agenda or tape recording of a lawfully closed meeting confidential. *See* Gov't Code § 551.104(c). A certified agenda or tape recording of a closed meeting is available for public inspection and copying only under a court order issued under section 551.104. *See id.*; *see also* Open Records Decision No. 495 at 4 (1988). Section 551.146 of the Open Meetings Act makes it a criminal offense to disclose a certified agenda or tape recording of a lawfully closed meeting to a member of the public. We note, however, that the proceedings of a governmental body in a closed meeting are not absolutely confidential. *See* Attorney General Opinion JM-1071 at 3 (1989) (statutory predecessor to Gov't Code § 551.146 Code does not prohibit members of governmental body or other individuals in attendance at executive session from making public statements about subject matter of executive session); Open Records Decision Nos. 605 at 2-3 (1992) (mere fact that information was discussed in executive session does not make information confidential under statutory predecessor to Gov't Code ch. 552), 485 at 9-10 (1987) (investigative report was not excepted from disclosure under statutory predecessor to Gov't Code § 552.101 simply by virtue of its having been considered in executive session).

In this instance, you contend that the submitted representative samples of the following categories of information are confidential under section 552.101 of the Government Code because they relate to executive sessions of the district's board of directors: (1) certified agendas of closed meetings, (2) notes taken by the district's office manager in closed meetings, and (3) "modified" minutes of the district's board meetings that are marked "confidential" and include summaries of comments made by board members and the board's attorneys in executive session.³ We agree that the certified agenda of a lawfully closed meeting of the district's board of directors is confidential under section 551.104 of the Open Meetings Act. We also agree that the requestor has no right of access to the certified agenda under section 552.023 of the Government Code.⁴ *See* Gov't Code § 551.104(c) (certified agenda of closed meeting available for public inspection and copying only under court order issued under Gov't Code § 551.104(b)(3)); *id.* § 552.023(b) (governmental body may assert as grounds for denial of access to information other provisions of Gov't Code ch. 552 or other law not intended to protect person's privacy interests); Attorney General Opinion JM-995 at 6 (1988) (public disclosure of certified agenda of closed meeting may be accomplished only under procedures provided in Open Meetings Act); Open Records Decision No. 330 at 2 (1982) (statutory predecessor to Gov't Code ch. 552 did not entitle individual to transcript of his testimony taken in executive session). We therefore conclude

³You inform us that the district does not maintain tape or electronic recordings of its closed sessions. We note that 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).

⁴*See* Gov't Code § 552.023(a) (person or person's authorized representative has special right of access, beyond right of general public, to information held by governmental body that relates to person and is protected from public disclosure by laws intended to protect person's privacy interests).

that the district must withhold the submitted certified agenda under section 552.101 of the Government Code. We also conclude, however, that neither the submitted notes taken in a closed meeting nor the submitted “modified” minutes of a board meeting are excepted from disclosure under section 552.101 in conjunction with section 551.104 of the Open Meetings Act. *See* Open Records Decision Nos. 605 at 2-3 (1992), 485 at 9-10 (1987); *see also* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express, and confidentiality requirement will not be implied from statutory structure), 649 at 3 (1996) (language of confidentiality provision controls scope of its protection), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to public).

You also contend that the notes and minutes are 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). The 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 [1st 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.*

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.* Among other examples, this office has concluded that litigation was reasonably anticipated

where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission (“EEOC”), *see* Open Records Decision No. 336 (1982); (2) 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 (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

You state that the submitted notes and minutes relate to a contractual dispute between the district and the requestor’s client. You have submitted correspondence relating to the dispute in which the requestor, an attorney, demands payment for his client’s services and threatens legal action. Based on your representations and our review of the submitted documentation, we find that litigation was reasonably anticipated on the date of the district’s receipt of this request for information. We also find that the submitted notes and minutes are related to the anticipated litigation. We therefore conclude that the district may withhold the notes and minutes at this time under section 552.103 of the Government Code.

In reaching this conclusion, we assume that the opposing party in the anticipated litigation has not seen or had access to the information at issue. 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). If the opposing party has seen or had access to information that relates to the anticipated 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). Furthermore, 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).

In summary, the submitted certified agenda must be withheld from disclosure under section 552.101 of the Government Code in conjunction with section 551.104 of the Open Meetings Act. The district may withhold the submitted notes and minutes at this time under section 552.103. As we are able to make these determinations, we need not address the district’s arguments under section 552.107.

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).

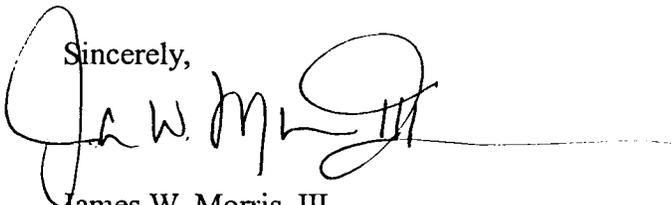
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 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 "James W. Morris, III", with a horizontal line extending to the right.

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

JWM/sdk

Ref: ID# 187848

Enc: Submitted documents

c: Mr. Hector Uribe
1122 Colorado, Suite 307
Austin, Texas 78701
(w/o enclosures)