



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 25, 2008

Ms. Bian E. Beverly  
Director of Legal Services  
North Texas Tollway Authority  
P.O. Box 260729  
Plano, Texas 75026

OR2008-03889

Dear Ms. Beverly:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 305405.

The North Texas Tollway Authority (the "authority") received a request for eight categories of information pertaining to a specific traffic accident. You state that you have no information responsive to categories one, two and seven of the request. We note that the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. 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. You claim that the submitted information is not subject to the Act. In the alternative, you argue that the information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. We have considered the arguments you make and reviewed the submitted information.

Initially, we note that some of the submitted documentation, which we have marked, is not responsive to the instant request for information as it was created after the date of this request. The authority need not release nonresponsive information in response to this request, and this ruling will not address that information. *See Bustamante* at 268.

The authority asserts the submitted information is in the constructive possession of a grand jury and therefore is not subject to disclosure under the Act. In this regard, we note that subsection 552.003(1)(B) of the Government Code provides that a "governmental body . . . does not include the judiciary." This office has concluded that grand juries are part

of the judiciary for purposes of the Act. *See* Open Records Decision No. 398 at 2 (1983). In Open Records Decision No. 513 (1988), this office concluded that information obtained by a governmental body pursuant to a grand jury subpoena issued in connection with a grand jury investigation is within the grand jury's constructive possession and is not subject to the Act. *See* Gov't Code § 552.003. However, if an investigation began before any information was submitted to the grand jury, and the grand jury did not formally request or direct all of the governmental body's actions in the investigation, then the information is not deemed to be in the grand jury's constructive possession. ~~Open Records Decision No. 513 at 4.~~ The fact that information collected or prepared by a governmental body is submitted to the grand jury, when taken alone, does not mean that the information is in the grand jury's constructive possession when the same information is also held by the governmental body. *Id.*

In this instance, we understand that the information at issue was collected and is maintained by the authority in the normal course of business, and that the authority later submitted these records to a grand jury. Therefore, we conclude that the submitted information is not in the constructive possession of the grand jury, but rather, constitutes public information subject to disclosure under the Act because the authority did not collect the information at the express direction of the grand jury. *See* Gov't Code § 552.002 (defining "public information" for purposes of Act); Open Records Decision No. 398 (1983) (audit prepared at direction of Nueces County Grand Jury held in Grand Jury's constructive possession). Accordingly, we will address your assertions under the Act.

Next, we note that the submitted documents include a CRB-3 accident report form completed pursuant to chapter 550 of the Transportation Code. *See* Transp. Code § 550.064 (officer's accident report). Section 550.065(b) states that except as provided by subsection (c), accident reports are privileged and confidential. Section 550.065(c)(4) provides for the release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *Id.* § 550.065(c)(4). Under this provision, a governmental body is required to release a copy of an accident report to a person who provides the governmental body with two or more pieces of information specified by the statute. *Id.* In this instance the requestor has provided the authority with the required pieces of information. Thus, the authority must release the accident report form under section 550.065(c)(4) of the Transportation Code.

We next note that a portion of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides in part:

- (a) the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

...

(5) all 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[.]

Gov't Code § 552.022(a)(3), (5). The information at issue includes a contract and information used to estimate the expenditure of public funds. The authority must release this information unless it is expressly confidential under other law. You claim that the information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. We note that these sections are discretionary exceptions that protect the governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W. 3d 469, 475-76 (Tex.App.-Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); Open Records Decision No. 586 (1991) (governmental body may waive section 552.108). As such, the authority may not withhold the information that is subject to section 552.022 under section 552.103 or section 552.108. As you raise no further exceptions against the disclosure of this information, it must be released. With respect to the remaining submitted information not subject to section 552.022, we will address your claimed exceptions against disclosure.

Section 552.108(a)(1) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime [if] release of the information would interfere with the detection, investigation, or prosecution of crime.” Gov't Code § 552.108(a)(1). A governmental body claiming section 552.108 must reasonably explain how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

Typically, section 552.108 applies only to records of law enforcement agencies. However, it may be invoked by the proper custodian of information, such as the authority, if the records relate to an investigation or prosecution of criminal conduct. *See* Open Records Decision No. 474 at 4-5 (1987). Where a governmental body possesses information relating to a pending case of a law enforcement agency, the governmental body may withhold the information under section 552.108 if: (1) it demonstrates that the information relates to the pending case, and (2) this office is provided with a representation from the law enforcement entity that the law enforcement entity wishes to withhold the information. You have not provided this office with a representation from any law enforcement entity objecting to the release of the requested information. Therefore, we find you have not demonstrated the

applicability of section 552.108, and none of the remaining information may be withheld on that basis.

We now address your argument under section 552.103 for the information not subject to section 552.022. Section 552.103 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 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 for information, and (2) the information at issue is related to that litigation. *See Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex.App.-Austin 2002, no pet.); *Univ. of Tex. Law Sch. v. Tex. 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 [1<sup>st</sup> 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 section 552.103(a). ORD 551 at 4.

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 demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* 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*

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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).

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 instance, you contend that the request for information was submitted “by an attorney and law firm, which is a strong indication that the [authority] . . . can reasonably anticipate being a party to the litigation initiated or pursued by the law firm with which the requestor . . . is associated.” However, we determine that you have failed to demonstrate that any potential opposing party has taken concrete steps toward the initiation of litigation. Therefore, you have not established that the authority reasonably anticipated litigation when it received the request for information. *See generally* ORD 452 at 4 (1986) (whether litigation is reasonably anticipated must be determined on case-by-case basis). Accordingly, the authority may not withhold the submitted information under section 552.103 of the Government Code. As you raise no further exceptions against the disclosure of this information, the submitted information must be released.

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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 challenge 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 Office of the Attorney General 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. 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,



Chris Schulz  
Assistant Attorney General  
Open Records Division

CS/jb

Ref: ID# 305405

Enc. Submitted documents

c: Mr. Dennis D. Conder  
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(w/o enclosures)