



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

August 4, 2009

Mr. Vic Ramirez
Associate General Counsel
Lower Colorado River Authority
P.O. Box 220
Austin, Texas 78767-0220

OR2009-10780

Dear Mr. Ramirez:

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# 351243.

The Lower Colorado River Authority (the "LCRA") received a request for "all e-mails, correspondence, memos and other written material" during a specified time period, relating to how the LCRA would satisfy its liability should the LCRA-San Antonio water sharing deal fail. You state the LCRA has released a portion of the information. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code.¹ We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

Initially, we note that you have redacted a portion of the memorandum you state has been released. Pursuant to section 552.301 of the Government Code, a governmental body that

¹Although you also raise the remainder of the exceptions under the Act, we note you have not submitted arguments in support of these exceptions.

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

seeks to withhold requested information must submit to this office a copy of the information, labeled to indicate which exceptions apply to which parts of the copy, unless the governmental body has received a previous determination for the information at issue. *See* Gov't Code §§ 552.301(a), .301(e)(1)(D). You do not assert, nor does our review of our records indicate, that the LCRA is authorized to redact this type information without seeking a ruling from this office. *See id.* § 552.301(a); Open Records Decision No. 673 (2000). Nor have you raised an exception under the Act and made arguments to this office for withholding the redacted information. Accordingly, the LCRA has failed to comply with section 552.301 with regard to the redacted information, and thus, this information is presumed public under section 552.302 and must be released. *See* Gov't Code §§ 552.301(e)(1)(D), .302.

We now turn to your argument under section 552.103 of the Government Code for the information at issue. Section 552.103 provides in relevant part 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). 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 was pending or reasonably anticipated on the date that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *See 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 [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551.

To establish that litigation is reasonably anticipated, the LCRA must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *See* 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. *See* Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party 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). 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. *See* Open Records Decision No. 361 (1983).

You inform us, and submit documentation showing, that prior to the date the LCRA received the instant request for information, the LCRA received a demand letter from an attorney representing the San Antonio Water System ("SAWS") alleging that the LCRA breached an agreement to study a potential water supply project. In the letter, the attorney makes a demand for full payment of services that have been provided by SAWS in the event the LCRA fails to cure the alleged default. The submitted documents reflect that SAWS claims to have spent \$40 million over the last seven years in preliminary study costs associated with the agreement. You further state, and provide documentation showing that, on the same day, the board of SAWS passed a resolution directing that no more payments be made to the LCRA under the agreement and directing staff to pursue "all available contractual, judicial, administrative, and other relief against LCRA." You have also submitted a press release, issued the same day, in which SAWS declares the LCRA in breach of contract and cites the possibility of litigation if the matter is not resolved. Finally, you inform us the submitted information relates to the agreement at issue. Based on your representations and our review of the submitted documents, we determine the LCRA has established that litigation was reasonably anticipated on the date that it received the request for information. Further, we determine that the information at issue is related to the anticipated litigation for the purposes of section 552.103. Therefore, we conclude that the LCRA may withhold the information at issue under section 552.103 of the Government Code.

However, we note that 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. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the pending litigation is not excepted from disclosure under section 552.103(a), and must be disclosed. Further,

the applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).¹

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Pamela Wissemann
Assistant Attorney General
Open Records Division

PFW/rl

Ref: ID# 351243

Enc. Submitted documents

c: Requestor
(w/o enclosures)

¹As our ruling is dispositive, we do not address your other arguments against disclosure.