



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 14, 2009

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

OR2009-12893

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# 356352.

The Lower Colorado River Authority (the "authority") received a request for (1) all contracts between the authority and two named companies related to Water Availability Modeling from January 1, 2007 to the date of the request, in which the authority employed two named individuals; (2) all documents evidencing reports, compensation, communications, and correspondence with the named companies and the named individuals in item one of the request relating to Water Availability Modeling from January 1, 2007 to the date of the request; and (3) any other contracts between the authority and the named companies in item one of the request, in which the authority employed the two named individuals to work on any other project "below Austin."¹ You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.104, 552.105, 552.107, 552.111, 552.117, 552.133, 552.136, 552.137, and 552.147 of the Government Code and privileged under Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5.² You also state

¹We note the authority sought and received clarification of the request. *See* Gov't Code § 552.222(b) (stating that if information requested is unclear, governmental body may ask requestor to clarify or narrow request).

²Although you also raise section 552.024 of the Government Code, we note this section is not an exception to public disclosure under the Act. Rather, this section permits a current or former official or employee of a governmental body to choose whether to allow public access to certain information relating to the current or former official or employee that is held by the employing governmental body. *See id.* § 552.024.

release of portions of the submitted information may implicate the interests of the City of Austin, White Stallion Energy Center, L.L.C. ("White Stallion"), the City of Corpus Christi, and the City of San Antonio, acting by and through the City Public Service Board ("CPS Energy"). You notified these entities of the request for information and of their right to submit arguments to this office as to why their information should not be released. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). We have received correspondence from CPS Energy and a representative of White Stallion. We have considered all of the submitted arguments and have reviewed the submitted representative sample of information.³

Initially, we note you have not submitted a representative sample of any contracts responsive to items one and three of the request, nor have you submitted a representative sample of any documents evidencing compensation responsive to item two of the request. We assume that, to the extent this information existed when the authority received the request for information, you have released it to the requestor. If not, then you must do so at this time. *See* Gov't Code §§ 552.006, 552.301, 552.302; Open Records Decision No. 664 (2000).

We now turn to your argument under section 552.103 of the Government Code for the submitted information. 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.

³We assume the "representative samples" of records submitted to this office are 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.

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 authority 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 Nos. 555 (1990), 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 authority received the instant request for information, the authority received a demand letter from an attorney representing the San Antonio Water System ("SAWS") alleging that the authority 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 authority 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 authority under the agreement and directing staff to pursue "all available contractual, judicial, administrative, and other relief against [the authority]." You have also submitted a press release, issued the same day, in which SAWS declares the authority in breach of contract and cites the possibility of litigation if the matter is not resolved. Finally,

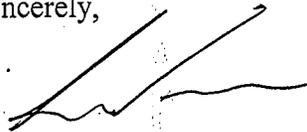
you inform us the submitted information relates to the issues in the anticipated litigation. Based on your representations and our review of the submitted documents, we determine the authority has established that litigation was reasonably anticipated on the date that it received the request for information. Further, we determine the information at issue is related to the anticipated litigation for the purposes of section 552.103. Therefore, we conclude the authority may withhold the information at issue under section 552.103 of the Government Code.

However, we note 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 anticipated or 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 related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).⁴

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, toll free, at (888) 672-6787.

Sincerely,



Ana Carolina Vieira
Assistant Attorney General
Open Records Division

ACV/eeg

⁴As our ruling is dispositive, we do not address your other arguments against disclosure.

Ref: ID# 356352

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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