



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 16, 2009

Mr. Clark McCoy
Wolfe, Tidwell, & McCoy, LLP
2591 Dallas Parkway, Suite 205
Frisco, Texas 75034

OR2009-16191

Dear Mr. McCoy:

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# 361395 (City of Anna File Nos. C03029PIR20090715-04, C0329PIR20090908-01, C0329PIR20090908-02, C0329PIR20090908-03, and C03029PIR20090910-01).

The City of Anna (the "city"), which you represent, received five requests for information from the same requestor for information relating to the requestor's water usage from 2007-2009, the city's public utility fee schedule, public utility contracts, and the installation, maintenance, and testing of public utility water meters. You state that the city has provided some of the information to the requestor. You claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information, a portion of which consists of a representative sample.¹

You argue that some of the submitted information, which you marked, is not responsive to the instant request for information because it was created after the date of the request. Upon

¹We 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.

review, we agree. This ruling does not address the public availability of the information you marked that is not responsive to the request. Thus, the city is not required to release this information in response to these requests.

You note that some of the requested information was the subject of a previous request from this requestor as a result of which this office issued Open Records Letter No. 2009-12245 (2009). We have no indication that there has been any change in the law, facts, or circumstances on which the previous ruling was based. We therefore conclude that the city must continue to rely on Open Records Letter No. 2009-12245 as a previous determination and release the previously ruled upon information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, the present requests seek additional information that was not addressed in Open Records Letter No. 2009-12245; therefore, we will consider your arguments against disclosure of this 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.

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. *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 [1st Dist.] 1984, writ ref'd n.r.e.); ORD 551 at 4. A governmental body must meet both prongs of this test for

information to be excepted under section 552.103(a). To establish 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). 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. Open 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. Open Records Decision No. 331 (1982). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. ORD 452 at 4. This office has concluded that a governmental body's receipt of a claim letter that it represents to be in compliance with the notice requirements of the Texas Tort Claims Act (the "TTCA"), chapter 101 of the Civil Practice and Remedies Code, is sufficient to establish that litigation is reasonably anticipated. If this representation is not made, then the receipt of the claim letter is a factor that we will consider in determining, from the totality of the circumstances presented, whether the governmental body has established that litigation is reasonably anticipated. *See* Open Records Decision No. 638 at 4 (1996).

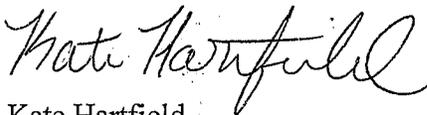
You assert the city reasonably anticipates litigation involving the requestor. You state that the requestor has provided the city notice with respect to her tort claim of fraud related to her water meter reading and billing by the city in accordance with the TTCA prior to the dates of the requests at issue. You also state that the city has placed a litigation hold on all documents or information that might directly or indirectly relate to evidence regarding the requestor's water account or her allegations of illegal withholding of information regarding the same, including the requested information. Finally, you assert that the submitted information directly relates to the requestor's stated claims for fraud, deception, and over-billing. Based on your representations and our review of the information at issue, we find that the remaining information is related to litigation that the city reasonably anticipated when it received the instant requests for information. We therefore conclude that the city may withhold the remaining information under section 552.103 of the Government Code.

However, once information has been obtained by all parties to the anticipated 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 must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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,



Kate Hartfield
Assistant Attorney General
Open Records Division

KH/eeg

Ref: ID# 361395

Enc. Submitted documents

c: Requestor
(w/o enclosures)