



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 4, 2012

Mr. Matthew C. Ryan
Allensworth & Porter, L.L.P.
For Aqua Water Supply Corporation
100 Congress Avenue, Suite 700
Austin, Texas 78701-3229

OR2012-00156

Dear Mr. Ryan:

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# 441259.

The Aqua Water Supply Corporation (the "corporation") received a request for twenty-six categories of information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.110 of the Government Code. We have considered your arguments and reviewed the submitted representative sample of information.¹

Initially, we note some of the submitted information, which we have marked, is not responsive to the instant request for information because it was created after the date the request was received. This ruling does not address the public availability of non-responsive information, and the corporation is not required to release non-responsive information in response to this request.

We also note you have failed to fully comply with section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office

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.

and state the exceptions that apply within ten business days of receiving the written request. *See* Gov't Code § 552.301(a), (b). You state the corporation received the present request for information on October 12, 2011. Therefore, you were required to submit your request for a decision, stating the exceptions that apply, by October 26, 2011. Although you timely submitted your initial request for a decision to this office, you initially raised sections 552.101, 552.103, and 552.110 of the Government Code only as exceptions to disclosure of the submitted information.² Because you stated "section 552.101" only, you did not indicate you are asserting the attorney-client privilege or attorney work-product privilege until November 2, 2011 when you asserted Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5 in conjunction with section 552.101. This office has concluded section 552.101 does not encompass discovery privileges. *See* Open Records Decision Nos. 676 at 1-2 (2002), 575 at 2 (1990). We note the proper exceptions to raise when asserting the attorney-client privilege and attorney work-product privilege for information not subject to section 552.022 of the Government Code are sections 552.107 and 552.111 of the Government Code, respectively. *See* Open Records Decision Nos. 677 (2002), 676 at 6. Consequently, we find the corporation has failed to comply with the ten business day deadline mandated by section 552.301(b) with respect to your claims under the attorney-client and attorney work-product privileges.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to comply with the requirements of section 552.301 results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See* Gov't Code § 552.302; *Simmons v. Kuzmich*, 166 S.W.3d 342, 350 (Tex. App.—Fort Worth 2005, no pet.); *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381 (Tex. App.—Austin 1990, no writ); *see also* Open Records Decision No. 630 (1994). Normally, a compelling reason to withhold information exists where some other source of law makes the information confidential or where third-party interests are at stake. *See* Open Records Decision No. 150 at 2 (1977). Although the corporation seeks to withhold some of the submitted information under sections 552.107 and 552.111 of the Government Code and Texas Rule of Evidence 503 and Texas Rule of Civil Procedure 192.5, these exceptions and rules are discretionary in nature and do not demonstrate a compelling reason to withhold information from the public. *See* Open Records Decision Nos. 677 at 10 (attorney work-product privilege under section 552.111 or rule 192.5 is not compelling reason to withhold information under section 552.302), 676 at 12 (claim of attorney-client privilege under section 552.107 or rule 503 does not provide compelling reason to withhold information under section 552.302 if it does not implicate third-party rights), 663 at 5 (1999) (waiver of discretionary exceptions). Because the corporation failed to comply with the procedural requirements of the Act with respect to sections 552.107 and 552.111 and rules 503 and 192.5, the corporation has waived its claims

²Although you initially raise section 552.104 of the Government Code, you make no arguments to support this exception. Therefore, we assume you no longer assert section 552.104. *See* Gov't Code §§ 552.301(b), (e), .302.

under these exceptions and rules, and no information may be withheld on the basis of these exceptions and rules. Section 552.101 of the Government Code can provide a compelling reason to withhold information; however, you do not cite to any specific law, and we are not aware of any, that makes any portion of the submitted information confidential under section 552.101. *See* Open Records Decision No. 478 at 2 (1987) (statutory confidentiality requires express language making information confidential or stating that information shall not be released to public). Therefore, the corporation may not withhold any portion of the submitted information under section 552.101. We note, however, that a portion of the submitted information may be subject to section 552.137 of the Government Code.³ Because section 552.137 of the Government Code can provide a compelling reason to withhold information, we will consider the applicability of this exception to the submitted information, as well as the corporation's timely-raised claims under sections 552.103 and 552.110 of the Government Code.

The corporation asserts a portion of the submitted information is excepted under section 552.103 of the Government Code, which provides in 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 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 of the receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *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). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

To establish that 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). In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect that litigation is “realistically contemplated.” See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (finding that investigatory file may be withheld from disclosure if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is “reasonably likely to result”). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. See ORD 452 at 4.

You state, and provide documentation showing, the corporation filed suit on October 7, 2011, against multiple defendants, in the case styled *Aqua Water Supply Corporation v. City of Elgin, et al*, Civil Action No. 11-885, currently pending in the United States District Court for the Western District of Texas, Austin Division. Upon review, we agree the corporation has established it reasonably anticipated litigation on the date it received the request for information. We also agree the information at issue is related to the anticipated litigation for purposes of section 552.103. Accordingly, the corporation may withhold the information we have marked under section 552.103 of the Government Code.

Generally, however, once information has been obtained by all parties to the pending 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 all parties to 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 or is no longer reasonably anticipated. See Attorney General Opinion MW-575 (1982); see also Open Records Decision No. 350 at 3 (1982), 349 at 2.

The corporation raises section 552.110 of the Government Code for a portion of the remaining information. Section 552.110 protects (1) trade secrets, and (2) commercial or financial information the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. See Gov’t Code § 552.110(a)-(b). We note that section 552.110 is designed to protect the interests of third parties, not the interests of a governmental body. Thus, we do not address the corporation’s arguments under section 552.110 of the Government Code.

Finally, we note the remaining information contains e-mail addresses which may be subject to Section 552.137 of the Government Code. Section 552.137 excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body,” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, or an e-mail address

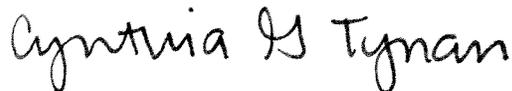
maintained by a governmental entity for one of its officials or employees. *See id.* § 552.137(c). The e-mail addresses at issue are not excluded by subsection (c). Accordingly, the corporation must withhold the e-mail addresses we have marked under section 552.137 of the Government Code unless the owners of the addresses have affirmatively consented to their public disclosure.

In summary, the corporation may withhold the information we have marked under section 552.103 of the Government Code. The corporation must withhold the e-mail addresses we have marked under section 552.137 of the Government Code unless their owners have consented to their release.⁴ The remaining information must be released.

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,



Cynthia G. Tynan
Assistant Attorney General
Open Records Division

CGT/em

Ref: ID# 441259

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴In Open Records Decision No. 684 (2009), this office issued a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.