



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 16, 2012

Mr. Ross S. Martin
Kelly Hart & Hallman, LLP
201 Main Street, Suite 2500
Fort Worth, Texas 76102

OR2012-05432

Dear Mr. Martin:

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# 450563.

The Denton County Fresh Water Supply District 1-A (the "district"), which you represent, received a request for fifteen categories of information: (1) contracts, agreements, and scope of services for two named individuals and two named entities; (2) billings, contracts, maps, allocation of billings, and a copy of the request for proposal for a specified contract pertaining to a named entity; (3) work orders and service tickets for the utilization of supplies from any of six named vendors; (4) work orders and service tickets for the utilization of supplies from two named individuals; (5) the general ledger for the district's financial statements for a specified time period; (6) reports and details allocating or reallocating amounts with the district's and Denton County Fresh Water Supply District 1-B's ("district 1-B") accounting ledgers; (7) copies of easement fee revenue checks to district 1-B, including certain backup and allocation schedules; (8) copies of any sources of revenue to district 1-B other than revenue noted in item seven of the request; (9) invoices, details of amounts, and allocations to district 1-B for payments from bank accounts other than a specified bank account for a specified time period; (10) detail of amounts included in entries to a named category for all departments; (11) department and employee payroll summary; (12) work detail, work orders, or job detail for each employee for a specified time period; (13) listing of invoices paid from bank accounts other than district 1-B's accounts allocated to district 1-B "outside of OA"; (14) invoices for all vendors whose payments were allocated to or paid directly by district 1-B, worksheets or journal entries of allocations directly to district 1-B for a specified time period, and copies of all legal and engineering invoices; and (15) specified invoices for a specified time period. 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 representative sample of information. We have also received and considered comments submitted by a representative of the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit written comments regarding why information should or should not be released).

Initially, we address your assertion that some of the requested information has previously been released. Generally, section 552.232 of the Government Code outlines the procedures a governmental body must follow in responding to a repetitious or redundant request from the same requestor. *Id.* § 552.232. However, section 552.232 applies only where a requestor has made a previous request for the same information under the Act. You do not explain what information responsive to the instant request was previously released or whether that information was provided in response to a request made under the Act, nor do you identify the previous requestor. Accordingly, you have failed to establish this is a repetitious or redundant request for purposes of the Act. Moreover, the Act does not permit selective disclosure of information to the public. *See id.* § 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). Thus, we will address your argument against disclosure of the submitted information.

Next, you state that this request is “onerous in nature” and the district “does not have the staff to process such extensive requests” in the time period required under the Act. We note a governmental body must make a good-faith effort to relate a request to information that is within its possession or control. Open Records Decision No. 561 at 8-9 (1990). We also note section 552.222 of the Government Code authorizes a governmental body to ask the requestor to clarify or narrow requests for information that are unclear or burdensome. *See* Gov't Code § 552.222(b). A governmental body may not refuse to comply with the requirements of the Act on the ground of administrative inconvenience. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976); *see also* Open Records Decision No. 497 at 4 (1988) (fact that submitting copies for review may be burdensome does not relieve governmental body of its responsibility to do so). Thus, the district must release the requested information unless it falls within the scope of an exception to disclosure. Because you have submitted responsive information for our review, we will consider your argument for this information.

You state you have submitted a representative sample of information; however, we find no portion of the submitted representative sample pertains to the portions of item two of the request seeking maps, allocation of billings, or a copy of the request for proposal for a specified contract pertaining to a named entity, or any of the information requested in items five through fifteen of the request. You have submitted service orders; however, the submitted service orders do not indicate from which of the named vendors in items three or four of the request supplies were utilized. Thus, we find the submitted information is not representative of all the information sought in the request for information. Please be advised this ruling applies to only the types of information you have submitted for our review. Therefore, this ruling does not authorize the withholding of any other requested records to the extent those records contain substantially different types of information than that

submitted to this office. *See* Gov't Code § 552.302 (where request for attorney general decision does not comply with requirements of section 552.301, information at issue is presumed public). Thus, to the extent information responsive to the information requested in the portions of item two of the request seeking maps, allocation of billings, or a copy of the request for proposal for a specified contract pertaining to a named entity, or any of the information requested in items five through fifteen of the request existed and was maintained by the district on the date the district received the request for information, we presume the district has released it. If the district has not released such information, the district must do so at this time. *See id.* §§ 552.301, .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to the requested information, it must release the information as soon as possible).

Next, we note some of the submitted information is subject to section 552.022 of the Government Code, which provides in pertinent part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or 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[.]

Gov't Code § 552.022(a)(3). The submitted Professional Services Agreement, which we have marked, is subject to section 552.022(a)(3) and must be released unless it is confidential under the Act or other law. Although you assert this information is excepted from disclosure under section 552.103 of the Government Code, this section is discretionary and does not make information confidential under the Act. *See* Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, §§ 3-21, 23-26, 28-37 (providing for "confidentiality" of information under specified exceptions); *see also 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); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the district may not withhold the information subject to section 552.022, which we have marked, under section 552.103. As you raise no further exceptions against its disclosure, the marked information must be released. We will, however, consider your arguments under section 552.103 for the remaining information that is not subject to section 552.022.

Section 552.103 of the Government Code 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 that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to the pending or anticipated 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). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a). *See* ORD 551 at 4.

In order to demonstrate that litigation is reasonably anticipated, the governmental body must provide this office "concrete evidence showing that the claim that litigation might ensue is more than a 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.¹ Open Records Decision No. 555 (1990); *see also* 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). We also note that 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).

¹In 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).

You argue the district anticipates litigation in this instance because an attorney for district 1-B has made threats to file litigation against the district. You state, prior to the date the district received the instant request for information, district 1-B's general counsel "repeatedly sent letters to the [d]istrict claiming that the [d]istrict is in breach of or default under the terms of an Operating Agreement by and between" the district and district 1-B. You also state the information at issue relates to the substance of the anticipated litigation. Based on your representations and our review, we find you have established litigation was reasonably anticipated on the date the district received the request for information. Accordingly, the district may withhold the submitted information that is not subject to section 552.022 under section 552.103 of the Government Code.

We note that once the 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 No. 349 at 2 (1982). We also note that the applicability of section 552.103(a) ends when the litigation is concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

In summary, with the exception of the information we have marked under section 552.022, which must be released, the district may withhold the submitted information under section 552.103 of the Government Code.

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,



Lindsay E. Hale
Assistant Attorney General
Open Records Division

LEH/ag

Ref: ID# 450563

Enc. Submitted documents

c: Requestor
(w/o enclosures)