



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 12, 2014

Mr. Anthony S. Corbett
Counsel for the Travis County Water Control and Improvement District No. 18
Freeman & Corbett, L.L.P.
2304 Hancock, Suite 6
Austin, Texas 78756

OR2014-20546

Dear Mr. Corbett:

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# 542885.

The Travis County Water Control and Improvement District No. 18 (the "district"), which you represent, received a request for any documents related to the maintenance of any water treatment facilities in use at any time over a specified time period, as well as all communications between the district and the requestor's client related to specified subjects over a specified time period; documents related to the maintenance of water treatment equipment and computer systems, to include documents reflecting the date, nature, and cause of malfunctions, as well as the identities of individuals who maintained the equipment; documents reflecting the design of a specified water overflow and drain piping; and minutes of any meetings pertaining to any of the matters to which the requested information pertains. You claim 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.¹ We have also received and considered comments submitted by the requestor's client. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

¹We assume 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.

Initially, as you acknowledge, the requestor has asked the district to answer questions. The Act does not require a governmental body to answer factual questions, conduct legal research, or create new information in responding to a request. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). However, a governmental body must make a good faith effort to relate a request to information held by the governmental body. *See* Open Records Decision No. 561 at 8 (1990). We assume the district has made a good faith effort to do so.

Next, we note the submitted information contains the minutes of meetings of the board of directors of the district. The minutes of a governmental body's public meetings are specifically made public under provisions of the Open Meetings Act (the "OMA"), chapter 551 of the Government Code. *See id.* § 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying on request to governmental body's chief administrative officer or officer's designee). Although you seek to withhold this information under section 552.103, as a general rule, the exceptions to disclosure found in the Act do not apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Accordingly, the district must release the minutes we have marked pursuant to the OMA.

Section 552.103 of the Government Code provides, in relevant 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 has the burden of providing relevant facts and documents to show section 552.103(a) applies in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the requested information 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, orig. proceeding); *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 at 4.

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, an attorney for a potential opposing party making a demand for payment and asserting an intent to sue if such payments are not made. Open Records Decision Nos. 555 at 3 (1990), 346 (1982). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party threatened to sue on several occasions and hired an attorney. *See* Open Records Decision No. 288 at 2 (1981). However, an individual publicly threatening to bring suit against a governmental body, but who does not actually take objective steps toward filing suit, is not concrete evidence that litigation is reasonably anticipated. *See* Open Records Decision No. 331 at 1-2 (1982).

You contend the district reasonably anticipates litigation because it is currently in a dispute with the requestor's client. However, the requestor's client argues he has neither threatened litigation, nor taken the necessary steps to file suit, but, instead, was attempting to forego litigation by attempting to get all involved parties to attend a mediation to "work towards a potential resolution." Nevertheless, you state, and provide documentation showing, the requestor claims 1) he has been retained to represent the requestor's client "in connection with claims he has against [the district]," 2) the district caused, and failed to correct, property damage to the requestor's client's property, and 3) "[the district's] actions in failing to maintain [its] equipment[,] coupled with the intentional diversion of water onto [the requestor's client's] property through the drain systems [the district] installed[,] constitutes negligence and trespass as well as violations of the Texas Tort Claims Act." Additionally, the submitted documentation reflects that, prior to the instant request, the requestor's client informed the district he seeks damages against it. Based on these representations and our review, we agree the district reasonably anticipated litigation on the date it received the request for information. You state, and we agree, the remaining information is related to the anticipated litigation. Thus, we find section 552.103 is applicable to the submitted information.

We note 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. *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 litigation is not excepted from disclosure under section 552.103(a). We note the opposing party to the anticipated litigation at issue has seen or had access to some of the remaining information. Therefore, the district may not withhold this information, which we have marked, pursuant to section 552.103. However, we agree the district may withhold the remaining information under section 552.103. We note 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).

In summary, the district must release the information we have marked under section 551.022 of the Government Code. With the exception of the information the opposing party to the litigation at issue has seen or had access to, which we have marked and which must be released, the district may withhold the remaining information under section 552.103 of the Government Code until litigation concludes or is no longer reasonably anticipated.²

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.texasattorneygeneral.gov/open/orl_ruling_info.shtml, 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Joseph Behnke
Assistant Attorney General
Open Records Division

JB/som

Ref: ID# 542885

Enc. Submitted documents

c: Requestor
(w/o enclosures)

²We note the requestor has a special right of access to some of the information being released in this instance. See Gov't Code § 552.023(a) (governmental body may not deny access to person to whom information relates, or that party's representative, solely on grounds that information is considered confidential by privacy principles).