



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

December 17, 2015

Ms. Lori Fixley Winland  
Counsel for the Central Texas Regional Mobility Authority  
Locke Lord, LLP  
600 Congress, Suite 2200  
Austin, Texas 78701

OR2015-26566

Dear Ms. Finley:

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# 591377.

The Central Texas Regional Mobility Authority (the "authority"), which you represent, received a request for information relating to the MoPac Improvement Project. You state you will release some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>1</sup> We have also received and considered the requestor's comments. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

Initially, we must address the requestor's claim the authority failed to comply with the procedural requirements a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. *See id.* § 552.301. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office

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<sup>1</sup>We 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.

and state the exceptions that apply within ten business days of receiving the written request. *See id.* § 552.301(b). Further, pursuant to section 552.301(e), a governmental body must submit to this office within fifteen business days of receiving an open records request (1) written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *See id.* § 552.301(e). The authority states it received the request for information on September 28, 2015. The authority further states it sought and received clarification of the request via a telephone conversation on October 9, 2015. *See Gov't Code* § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or over-broad request for public information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed). The authority also submits documentation demonstrating it sent a letter to the requestor confirming the clarification conversation. The authority also submits an affidavit from its Director of Engineering which states he spoke to a representative of CH2M in person on October 15, 2015 and that CH2M's representative verbally confirmed the telephone conversation clarified the request for information. However, the requestor contends the authority neither sought nor received a clarification of the request during the telephone conversation. The issue of whether a clarification was sought and received is a question of fact. This office cannot resolve factual disputes in the opinion process. *See Open Records Decision Nos.* 592 at 2 (1991), 552 at 5 (1990), 435 at 4 (1986). Where a fact issue cannot be resolved as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernible from the documents submitted for our inspection. *See ORD* 552 at 4. Therefore, based on the authority's representations and our review, we conclude the authority received clarification on October 9, 2015. Accordingly, the authority's ten- and fifteen-business-day deadlines were October 23, 2015 and October 30, 2015, respectively. We received the authority's request for a ruling via hand delivery on October 9, 2015, and the envelope in which the authority submitted the information required by section 552.301(e) bears a meter marked of October 30, 2015. *See id.* 552.308(a)(1) (describing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Therefore, we conclude the authority timely submitted the information required by sections 552.301(b) and 552.301(e).

The requestor also contends the authority did not comply with section 552.301(e-1) of the Government Code. Section 552.301(e-1) requires a governmental body that submits written comments requesting a ruling to the attorney general under subsection 552.301 (e)(1)(A), to send a copy of those comments to the person who requested the information from the governmental body not later than the fifteenth business day after the date of receiving the

request. *Id.* § 552.301(e-1). The requestor contends it did not receive the authority's comments until November 2, 2015. However, the authority submits documentation demonstrating the information required by section 552.301(e-1) was mailed to the requestor on October 30, 2015. *See id.* § 552.308(a)(1) (prescribing rules for calculating submission dates of documents sent via first class United States mail, common or contract carrier, or interagency mail). Accordingly, we find the authority complied with the requirements of section 552.301 of the Government Code.

Section 552.103 of the Government Code 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.

*Id.* § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date the governmental body received the request for information and (2) the information at issue is related to that litigation. *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). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

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). Further, concrete evidence to support a claim that litigation is reasonably anticipated may also include 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”). 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 state the authority and the requestor are currently engaged in a dispute related to the significant delays in the completion of the MoPac Improvement Project. You inform us, prior to the receipt of the instant request, the parties started pursuing a formal dispute resolution process before a three-member Dispute Resolution Board (the “board”) as provided for under the contract concerning delays. You inform us the process with the board is a condition precedent to litigation, and either party may, pursuant to the terms of the contract, submit the dispute to judicial resolution within six months of the issuance of the board’s recommendations. You also state, that prior to receiving the present request for information, the authority received a document from the requestor that indicated it was “prepared at the direction of counsel in anticipation of litigation and for settlement purposes only.” Additionally, you state the submitted information relates to the anticipated litigation against the authority. Based on your representations, our review, we find the authority reasonably anticipated litigation on the date it received the request for information. We also find the authority has established the information at issue is related to the anticipated litigation for purposes of section 552.103(a). Therefore, the authority may withhold the submitted information under section 552.103(a) of the Government Code.

We note, however, the purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery procedures. *See* ORD 551 at 4-5. Thus, if the opposing party has seen or had access to information relating to the anticipated litigation through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982); 320 (1982). We also note the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).<sup>2</sup>

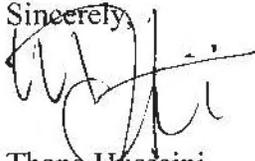
This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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<sup>2</sup>As our ruling is dispositive, we need not address your remaining argument against disclosure.

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](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,

A handwritten signature in black ink, appearing to read 'Thana Hussaini', written over a horizontal line.

Thana Hussaini  
Assistant Attorney General  
Open Records Division

TH/som

Ref: ID# 591377

Enc. Submitted documents

c: Requestor  
(w/o enclosures)