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ATTORNEY GENERAL OF TEXAS

June 2, 2016

Mr. Shan Rutherford
Counsel for the Lampasas Economic Development Corporation
Law Offices of JC Brown, P.C.
1411 West Avenue, Suite 100
Austin, Texas 78701

OR2016-12595

Dear Mr. Rutherford:

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# 612772.

The Lampasas Economic Development Corporation (the "LEDC"), which you represent, received a request for nine categories of information, including (1) the subdivision plans of the business park; (2) agreements between the LEDC and potential occupants of the business park; (3) communications sent or received by the LEDC pertaining to potential occupants of the business park; (4) agreements and communications between the LEDC and the City of Lampasas (the "city") after a specified date; (5) agreements and communications between the LEDC and the city related to water service to the business park after a specified date; (6) applications for specified utility services submitted to the city by the LEDC; (7) minutes of LEDC meetings, after a specified date, in which information was discussed or action was taken regarding water service to the business park; (8) information confirming a specified representation made on the LEDC's website regarding water service to the business park; and (9) certain financial information after a specified date. You claim the submitted information is either not subject to the Act or excepted from disclosure under sections 552.103, 552.107, and 552.131 of the Government Code.¹ We have considered the submitted arguments and reviewed the submitted representative sample of information.

¹Although you also raise section 552.111 of the Government Code, you have not provided any arguments to support this exception. Therefore, we assume you have withdrawn your claim this section applies to the submitted information. *See* Gov't Code §§ 552.301, .302.

You state, and provide documentation showing, the LEDC sought clarification for categories three and four of the request for information. *See* Gov't Code § 552.222(b) (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). There is no indication the LEDC has received a response to the request for clarification. Thus, for the requested information for which the LEDC has sought but has not received clarification, the LEDC has no obligation to release information that might be responsive to this portion of the request. However, if the requestor clarifies the request for information, the LEDC must seek a ruling from this office before withholding any information from the requestor that would be responsive to the clarification. *See* Gov't Code § 552.222(b); *City of Dallas*, 304 S.W.3d at 387. In this case, as the LEDC has submitted information responsive to the request and has made arguments against disclosure of this information, we will address the applicability of its arguments to the submitted information.

Initially, we note you have not submitted information responsive to categories 1-2 and 5-9 of the requested information. Further, you do not inform us you have released this information. Although you state the LEDC has submitted a representative sample of the requested information, we find the submitted information is not representative of all the types of information to which the requestor seeks access. Please be advised, this open records letter ruling applies only to the types of information you have submitted for our review. This ruling does not authorize the LEDC to withhold any information that is substantially different from the types of information you submitted to this office. *See* Gov't Code § 552.302 (where request for attorney general decision does not comply with requirements of Gov't Code § 552.301, information at issue is presumed to be public). Accordingly, to the extent any information responsive to categories 1-2 and 5-9 of the requested information existed on the date the LEDC received the request, we assume the LEDC has released it. If the LEDC has not released any such information, it must do so at this time. *See id.* §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

You argue a portion of the responsive information is not subject to the Act. The Act applies to “public information,” which is defined in section 552.002(a) of the Government Code as

information that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body:

(A) owns the information;

(B) has a right of access to the information; or

(C) spends or contributes public money for the purpose of writing, producing, collecting, assembling, or maintaining the information; or

(3) by an individual officer or employee of a governmental body in the officer's or employee's official capacity and the information pertains to official business of the governmental body.

Gov't Code § 552.002(a). Information is "in connection with the transaction of official business" if it is "created by, transmitted to, received by, or maintained by an officer or employee of the governmental body in the officer's or employee's official capacity, or a person or entity performing official business or a government function on behalf of a governmental body, and pertains to official business of the governmental body." *Id.* § 552.002(a-1). Thus, virtually all of the information in a governmental body's physical possession constitutes public information and thus is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). You assert portions of the information responsive to category four of the request consist of e-mails that do not concern the official business of the LEDC. You argue these e-mails do not constitute public information since the nature of these communications do not pertain to the transaction of the LEDC's official business. Upon review of the submitted information, we note the included e-mails pertain to the official business of the LEDC. Thus, the submitted information is public information under section 552.002 that must be released unless it falls within an exception to public disclosure. *See* Gov't Code §§ 552.002, .021. Accordingly, we will consider the LEDC's arguments against disclosure of this information.

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). The governmental body claiming section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information, and (2) the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, orig. proceeding); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

To establish litigation is reasonably anticipated for the purposes of section 552.103, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *See 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 litigation is “realistically contemplated.” *See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (finding investigatory file may be withheld if governmental body attorney determines it should be withheld pursuant to section 552.103 and 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.* We note contested cases conducted under the Administrative Procedure Act (the “APA”), chapter 2001 of the Government Code, are considered litigation for purposes of section 552.103. *See Open Records Decision No. 588 at 7 (1991).* We further note a contested case before the State Office of Administrative Hearings (“SOAH”) is considered litigation for the purposes of the APA. *See id.*

You state, prior to the LEDC's receipt of the instant request, litigation was reasonably anticipated. You explain the city is involved in ongoing litigation with the requestor, Kempner Water Supply Corp. (“Kempner”), regarding obligations between the parties pursuant to a wholesale water contract. You state the requestor has filed related litigation in an attempt to draw the LEDC into the litigation because the litigation relates to the LEDC's request for service from Kempner for the LEDC's industrial park. You inform this office the LEDC will file a petition to decertify the requestor's certificate of convenience and necessity with the Texas Commission on Environmental Quality. You further state the information at issue is related to the anticipated litigation as the requestor's certificate of convenience and necessity currently covers a portion of the LEDC's industrial park.

Therefore, we conclude the LEDC may withhold the responsive information under section 552.103 of the Government Code.²

Generally, however, once information has been obtained by all parties to the 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. *See* Attorney General Opinion MW-575 (1982); *see also* 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.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,



Gerald A. Arismendez
Assistant Attorney General
Open Records Division

GAA/dls

Ref: ID# 612772

Enc. Submitted documents

c: Requestor
(w/o enclosures)

²As our ruling is dispositive, we need not address your remaining arguments against disclosure of the submitted information.