



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

July 14, 2017

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

OR2017-15745

Dear Ms. Winland:

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# 664341.

The Central Texas Regional Mobility Authority (the "authority"), which you represent, received a request for: (1) all correspondence between named authority officials and CH2M Hill Engineers, Inc. ("CH2M") during a specified time frame; (2) all reports and specified correspondence related to a specified project during the specified time frame; (3) transcripts of specified hearings during the specified time frame; and (4) any reports by the authority or a consultant related to specified project. You state the authority will release some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. You also state release of this information may implicate the proprietary interests of CH2M. Accordingly, you state, and provide documentation supporting, you notified CH2M of the request for information and of its right to submit arguments to this office as to why the information at issue should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from CH2M.

We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>1</sup>

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information that is made confidential by statute. You claim the information you have marked Attachment E is confidential under section 154.073 of the Civil Practice and Remedies Code and section 2009.054 of the Government Code. Section 154.073 provides in relevant part the following:

(a) Except as provided by Subsections (c), (d), (e), and (f), a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.

(b) Any record made at an alternative dispute resolution procedure is confidential, and the participants or the third party facilitating the procedure may not be required to testify in any proceedings relating to or arising out of the matter in dispute or be subject to process requiring disclosure of confidential information or data relating to or arising out of the matter in dispute.

Civ. Prac. & Rem. Code § 154.073(a), (b). Similarly, section 2009.054 provides as follows:

(a) Sections 154.053 and 154.073, Civil Practice and Remedies Code, apply to the communications, records, conduct, and demeanor of the impartial third party and the parties.

(b) Notwithstanding Section 154.073(e), Civil Practice and Remedies Code:

(1) a communication relevant to the dispute, and a record of the communication, made between an impartial third party and the parties to the dispute or between the parties to the dispute during the course of an alternative dispute resolution procedure are confidential and may not be disclosed unless all parties to the dispute consent to the disclosure; and

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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 those records contain substantially different types of information than that submitted to this office.

(2) the notes of an impartial third party are confidential except to the extent that the notes consist of a record of a communication with a party and all parties have consented to disclosure in accordance with Subdivision (1).

Gov't Code § 2009.054. Further, this office has found that communications during a formal settlement process were intended to be confidential. Open Records Decision No. 658 at 4 (1998); *see also* Gov't Code § 2009.054(c). Sections 154.073 and 2009.054 pertain only to communications made during an alternative dispute resolution (“ADR”) procedure. You state the authority and CH2M are engaged in an ADR procedure before a jointly-appointed three-member Dispute Resolution Board (the “board”) provided for under the contract between the authority and CH2M related to the specified project. You state Attachment E consists of communications made by the parties to that dispute and the communications directly relate to settlement negotiations made pursuant to their participation in alternative dispute resolution procedures. Based on your representations and our review, we agree most of the information at issue consists of communications made at or during an ADR procedure. Therefore, with the exception of the information we have marked for release, the authority must withhold Attachment E under section 552.101 of the Government Code in conjunction with section 154.073 of the Civil Practice and Remedies Code and section 2009.054 of the Government Code.<sup>2</sup> However, we note the remaining information consists of lane closure schedules and manpower rosters related to the specified project. Upon review, we find this information does not consist of communications made at or during an ADR procedure. Accordingly, the authority may not withhold any of the remaining information in Attachment E under section 552.101 of the Government Code in conjunction with section 154.073 of the Civil Practice and Remedies Code or section 2009.054 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.

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(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

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<sup>2</sup>As our ruling is dispositive for this information, we need not address the remaining arguments against its disclosure.

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 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 CH2M are currently engaged in a dispute related to the significant delays in the completion of the specified project. You inform us the authority and CH2M continue to disagree regarding how to apportion responsibility for the delays and associated increases in project costs, and you state multiple claims remain pending before the board. You state contractual resolution procedures are a condition precedent to litigation, and if the dispute resolution procedures before the board do not result in a mutually acceptable resolution, litigation will ensue. Based on your representations and our review, we find the authority reasonably anticipated litigation on the date it received the request for information. Additionally, you state Attachment D relates to the anticipated litigation involving the authority. We also find you have established the information at issue is related

to the anticipated litigation for purposes of section 552.103(a). Therefore, the authority may withhold Attachment D under section 552.103(a) of the Government Code.<sup>3</sup>

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 litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, with the exception of the information we have marked for release, the authority must withhold Attachment E under section 552.101 of the Government Code in conjunction with section 154.073 of the Civil Practice and Remedies Code and section 2009.054 of the Government Code. The authority may withhold Attachment D under section 552.103(a) of the Government Code. The authority must release the remaining information.

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](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,



Tim Neal  
Assistant Attorney General  
Open Records Division

TN/tdw

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<sup>3</sup>As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

Ref: ID# 664341

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

Third Party  
(w/o enclosures)