



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

July 17, 2017

Mr. David A. McNamara  
Assistant General Counsel  
Port of Houston Authority  
111 East Loop North  
Houston, Texas 77029-4326

OR2017-15873

Dear Mr. McNamara:

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# 665923.

The Port of Houston Authority (the "port") received a request for information pertaining to a specified project (the "project"). The port claims the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions the port claims and reviewed the submitted representative sample of information.<sup>1</sup>

Initially, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant 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:

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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.

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body; [and]

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate[.]

Gov't Code § 552.022(a)(1), (3), (5). The information submitted as Exhibit B – Part 1 includes completed reports that are subject to section 552.022(a)(1). The port must release the completed reports pursuant to section 552.022(a)(1) unless they are excepted from disclosure under section 552.108 of the Government Code or are made confidential under the Act or other law. *See id.* § 552.022(a)(1). The information submitted as Exhibit B – Part 1 also contains information in an account, contract, or voucher relating to the receipt or expenditure of funds by the port that is subject to section 552.022(a)(3) of the Government Code and an estimate of the need for or expenditure of public funds or taxes by a governmental body that is subject to section 552.022(a)(5) of the Government Code. This information must be released unless it is made confidential under the Act or other law. *See id.* §§ 552.022(a)(3), (5). The port seeks to withhold the information subject to section 552.022 under section 552.103 of the Government Code. However, section 552.103 is discretionary in nature and does not make information confidential under the Act. *See 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 Gov't Code § 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the port may not withhold the information subject to section 552.022, which we have marked, under section 552.103 of the Government Code. However, because section 552.136 of the Government Code makes information confidential under the Act, we will address the applicability of section 552.136 for the information at issue.<sup>2</sup> We will also consider the applicability of the remaining exceptions the port claims for the submitted information.

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<sup>2</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

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.

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 establish litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." *Id.* In Open Records Decision No. 638 (1996), this office stated a governmental body has met its burden of showing litigation is reasonably anticipated by representing it received a notice-of-claim letter that is in compliance with the Texas Tort Claims Act ("TTCA"), chapter 101 of the Civil Practices and Remedies Code.

The port asserts the remaining information submitted as Exhibit B – Part 1 and the information submitted as Exhibit B – Part 2 is protected by section 552.103 of the Government Code. The port informs us the requestor is an attorney who represents Blanchard Contractors, Inc. ("Blanchard"), an entity that submitted a bid in response to a request for proposals related to the project. The port states Blanchard was not awarded the contract at issue and the port awarded the contract to another bidder. The port informs us since that time, Blanchard and its attorney have sent correspondence to the port threatening

to file a claim against the port related to “the unfair [p]rocurement and [e]valuation [p]rocess.” Specifically, the port states on March 31, 2017, the requestor sent a letter to the port stating “if Blanchard does not receive a satisfactory offer to resolve this matter on or before April 13, 2017, [Blanchard] will have no alternative but to exercise all remedies to the fullest extent provided by law and equity[.]” Further, the port states on April 27, 2017, in the instant request for information, the requestor asserts “Blanchard has instructed my firm to proceed with all claims for damages detailed in [his] previous correspondence” and threatens to “pursue all available remedies if [the port] chooses not to promptly resolve this letter.” The port does not affirmatively represent to this office the requestor’s correspondence is in compliance with the TTCA. Therefore, we will only consider the requestor’s letters as factors in determining whether the port reasonably anticipated litigation when it received the request for information. Based on the representations of the port, our review of the submitted documents, and the totality of circumstances, we find the port has demonstrated the port reasonably anticipated litigation on March 31, 2017, prior to the date it received the request for information.<sup>3</sup> We also find the port has established the submitted information is related to the anticipated litigation for purposes of section 552.103(a). Therefore, the information not subject to section 552.022 of the Government Code is generally subject to section 552.103(a) of the Government Code.<sup>4</sup>

However, 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 has seen or had access to some of the information not subject to section 552.022 of the Government Code. This information, which we have marked for release, may not be withheld under section 552.103(a). However, with the exception of the information we marked for release, the port may withhold the information not subject to section 552.022 of the Government Code under section 552.103(a) of the Government Code. We note the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision No. 350 (1982).

Section 552.136 of the Government Code provides, “Notwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code

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<sup>3</sup>We note 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).

<sup>4</sup>As our ruling is dispositive for this information, we need not address the remaining arguments against its disclosure.

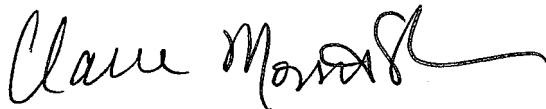
§ 552.136(b); *see id.* § 552.136(a) (defining “access device”). Accordingly, the port must withhold the routing and bank account numbers we have marked under section 552.136 of the Government Code.

In summary, with the exception of the information we marked for release, the port may withhold the information not subject to section 552.022(a)(3) of the Government Code under section 552.103(a) of the Government Code. The port must release the information we marked; however, in releasing the information subject to section 552.022(a)(3) of the Government Code, the port must withhold the routing and bank account numbers we marked under section 552.136 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.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,



Claire V. Morris Sloan  
Assistant Attorney General  
Open Records Division

CVMS/som

Ref: ID# 665923

Enc. Submitted documents

c: Requestor  
(w/o enclosures)