



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

February 27, 2020

Mr. Jason Cordoba
Counsel for Port Freeport
Cordoba Law Firm, P.L.L.C.
85 Oak Drive, Suite 102
Lake Jackson, Texas 77566

OR2020-06370

Dear Mr. Cordoba:

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# 813140.

Port Freeport (the "port"), which you represent, received a request for ten categories of information related to the Velasco Terminal Expansion project.¹ You state the port does not have information responsive to some of the categories of information requested.² You claim the submitted information is excepted from disclosure under sections 552.103, 552.107, and 552.111 of the Government Code.³ We have considered the exceptions you claim and reviewed the submitted information.

¹ The port informs us it sent the requestor an estimate of charges pursuant to section 552.2615 of the Government Code. *See* Gov't Code § 552.2615. The estimate of charges required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.263(a). The port indicates it received the required deposit on December 5, 2019. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date governmental body receives bond or deposit).

² The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

³ Although the port also raises section 552.105 of the Government Code for a portion of the submitted information, the port has not provided any arguments to support this exception. Therefore, we assume the port has withdrawn its claim this section applies to the information at issue. *See* Gov't Code §§ 552.301, 302.

Initially, we note the port sought clarification from the requestor for the first category of information requested. *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). You state the port has not received a response from the requestor for this portion of the request. Thus, for the portion of the request for which you have sought but not received clarification, we find the port is not required to release information in response to this portion of the request. However, if the requestor clarifies this portion of the request for information, the port must seek a ruling from this office before withholding any responsive information from the requestor. *See* Gov't Code 552.222; *City of Dallas*, 304 S.W.3d at 387. We note a governmental body has a duty to make a good-faith effort to relate a request for information to information the governmental body holds. Open Records Decision No. 561 (1990).

Next, we note some of the submitted information may have been the subject of a previous request for information, as a result of which this office issued Open Records Letter No. 2017-16547 (2017). In that ruling, we determined (1) to the extent the information we marked pertains to a living individual, the port must withhold the information we marked under section 552.101 of the Government Code in conjunction with common-law privacy; (2) the port must also withhold all living public citizens' dates of birth under section 552.101 of the Government Code in conjunction with common-law privacy; (3) the port must withhold the insurance policy, routing, and account numbers within the remaining information, representative samples of which we marked, under section 552.136 of the Government Code; (4) to the extent the e-mail addresses within the remaining information belong to members of the public, the port must withhold such e-mail addresses under section 552.137, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release; and (5) the port must release the remaining information; however, any information that is subject to copyright may be released only in accordance with copyright law. Section 552.007 of the Government Code provides, if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential by law. *See* Gov't Code § 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose information made confidential by law). Accordingly,

Further, we note, although the port raises section 552.072 of the Government Code, this section is not an exception to disclosure. *See id.* § 552.072. Finally, although the port raises rule 503 of the Texas Rules of Evidence and rule 192.5 of the Texas Rules of Civil Procedure for a portion of the submitted information, we note the proper exceptions to raise when asserting the attorney-client privilege or work product privilege for information not subject to section 552.022 of the Government Code, as in this case, are sections 552.107 and 552.111 of the Government Code, respectively. *See* Open Records Decision Nos. 677 (2002), 676 at 1-2 (2002).

pursuant to section 552.007, the port may not withhold previously released information unless its release is expressly prohibited by law or the information is confidential by law. Although the port seeks to withhold the information at issue under sections 552.103, 552.107, and 552.111 of the Government Code, these sections are discretionary exceptions to disclosure and do not prohibit the release of information or 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* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 676 at 10-11 (attorney-client privilege under Gov't Code § 552.107(1) may be waived), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 470 at 7 (1987) (deliberative process privilege under statutory predecessor to section 552.111 subject to waiver). Therefore, the port may not now withhold the information that was previously released in Open Records Letter No. 2017-16547 under section 552.103, 552.107, or 552.111 of the Government Code. We have no indication the law, facts, or circumstances on which the prior ruling was based have changed. Accordingly, to the extent the submitted information is identical to the information previously requested and ruled upon by this office in Open Records Letter No. 2017-16547, the port must continue to rely on this prior ruling as a previous determination and withhold or release the identical information in accordance with that ruling.⁴ *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in a prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, to the extent the submitted information was not at issue in the prior ruling, we will address the submitted arguments against disclosure of that information.

Next, 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:

...

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

...

⁴ As we are able to make this determination, we need not address your arguments against disclosure of this information.

(17) information that is also contained in a public court record; and

(18) a settlement agreement to which a governmental body is a party.

Gov't Code § 552.022(a)(3), (17)-(18). The submitted information includes information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body that is subject to section 552.022(a)(3), court-filed documents that are subject to section 552.022(a)(17), and settlement agreements with the port that are subject to section 552.022(a)(18). This information must be released unless it is made confidential under the Act or other law. *See id.* The port seeks to withhold the information subject to section 552.022 under section 552.103 of the Government Code. However, as noted above, section 552.103 is discretionary in nature and does not make information confidential under the Act. *See Dallas Morning News*, 4 S.W.3d at 475-76; *see also* ORDs 665 at 2 n.5, 663 at 5. Therefore, the port may not withhold the information subject to section 552.022, of which we marked a representative sample, under section 552.103 of the Government Code. However, we will consider the port's claim under section 552.103 for the information not subject to section 552.022. In addition, because sections 552.136 and 552.137 of the Government Code make information confidential under the Act, we will consider these exceptions for the information subject to section 552.022.⁵

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). A governmental body has the burden of providing relevant facts and documents to show section 552.103(a) is applicable 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 information at issue 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.*

⁵ The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470.

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.

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.” *See* ORD 452 at 4. 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* ORD 518 at 5; *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”). In addition, concrete evidence to support a claim litigation is reasonably anticipated may include, for example, 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. *See* Open Records Decision No. 555 (1990); *see also* ORD 518 at 5. In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, or when an individual threatened to sue on several occasions and hired an attorney. *See* Open Records Decision Nos. 346 (1982), 288 (1981). On the other hand, this office has determined if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish litigation is reasonably anticipated. *See* Open Records Decision No. 361 (1983). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* ORD 452 at 4.

You state the requested information relates to the acquisition of real property interests by the port in the East End. You explain, and provide documentation showing, prior to the receipt of the request for information, the port adopted a resolution authorizing the port’s acquisition of these properties, authorizing the port to exercise the power of eminent domain to acquire them, and authorizing the initiation of condemnation proceedings by the port. As a result of the acquisitions and proceedings, you state the port anticipates litigation in which the port is a party. You inform us the port has already been a party to one lawsuit involving a property related to the project, has received a third-party subpoena in relation to another lawsuit, and has received 28 letters of representation from the requestor in relation to some of properties at issue. Based on your representations and our review, we find the port anticipated litigation prior to the date of the request and the information at issue is related to the anticipated litigation. Therefore, with the exception of the information subject to section 552.022 of the Government Code, the port may withhold the information at issue under section 552.103(a) of the Government Code.⁶

⁶ As our ruling is dispositive for this information, we need not address your remaining arguments against its disclosure.

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 anticipated 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).

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 § 552.136(b); *see id.* § 552.136(a) (defining “access device”). Accordingly, the port must withhold the account numbers in the information subject to section 552.022 of the Government Code under section 552.136 of the Government Code.

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *Id.* § 552.137(a)-(c). The e-mail addresses at issue are not a type specifically excluded by section 552.137(c) of the Government Code. Accordingly, the port must withhold the e-mail addresses in the information subject to section 552.022 of the Government Code under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure.

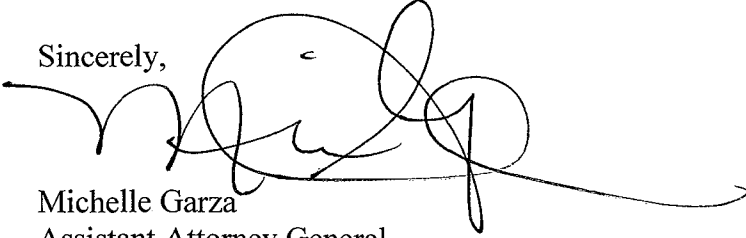
In summary, to the extent the submitted information is identical to the information previously requested and ruled upon by this office in Open Records Letter No. 2017-16547, the port must continue to rely on this prior ruling as a previous determination and withhold or release the identical information in accordance with that ruling. With the exception of the information subject to section 552.022 of the Government Code, a representative sample of which we marked and must be released, the port may withhold the remaining information at issue under section 552.103 of the Government Code. In releasing the information subject to section 552.022 of the Government Code, the port must withhold account under section 552.136 of the Government Code and e-mail addresses under section 552.137 of the Government Code, unless the owners of the e-mail addresses affirmatively consent to their disclosure.

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG’s Open

Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read 'Michelle Garza', with a long horizontal flourish extending to the right.

Michelle Garza
Assistant Attorney General
Open Records Division

MRG/be

Ref: ID# 813140

Enc. Submitted documents

c: Requestor
(w/o enclosures)