



**KEN PAXTON**  
ATTORNEY GENERAL OF TEXAS

May 7, 2020

Ms. Monica Trevino-Ortega  
Public Information Officer  
San Antonio River Authority  
100 East Guenther Street  
San Antonio, Texas 78204

OR2020-12955

Dear Ms. Trevino-Ortega:

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# 827058.

The San Antonio River Authority (the "authority") received a request for 25 categories of information pertaining to documents involving authority staff members and named entities regarding specified topics during specified time periods. You state you will release information responsive to category number 12 to the requestor. You claim the submitted information is excepted from disclosure under sections 552.103 and 552.111 of the Government Code and privileged under Texas Rule of Civil Procedure 192.5. We have considered the submitted arguments and reviewed the submitted representative sample of information.<sup>1</sup> We have also received and considered comments from an attorney for the requestor. *See Gov't Code § 552.304* (interested party may submit comments stating why information should or should not be released).

Initially, we note some of the submitted information, which we marked, is not responsive to the instant request for information because it was created after the date the authority received the instant request for information. *See Econ. Opportunities Dev. Corp. v.*

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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.

*Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 452 at 3 (1986), 362 at 2 (1983). This ruling does not address the public availability of any information that is not responsive to the request and the authority is not required to release such information in response to this request.<sup>2</sup>

Next, we note the remaining information includes an audio recording of a public meeting. The recordings of a governmental body's public meetings are specifically made public under provisions of the Open Meetings Act, chapter 551 of the Government Code. *See* Gov't Code § 551.022 (minutes and tape recordings of open meetings are public records and shall be available for public inspection and copying on request to governmental body's chief administrative officer or officer's designee). The exceptions to disclosure found in the Act, such as sections 552.103 and 552.111, do not apply to information that other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Accordingly, the authority must release the submitted audio recording of the public meeting pursuant to chapter 551 of the Government Code.

Some of the remaining information is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part, as follows:

(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[.]

Gov't Code § 552.022(a)(3). The information at issue consists of information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body. Information subject to section 552.022(a)(3) must be released unless such information is made confidential under the Act or other law. *See id.* You seek to withhold the information at issue under sections 552.103 and 552.111 of the Government Code. However, sections 552.103 and 552.111 are discretionary in nature and do 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. 677 (2002) (governmental body may waive attorney work product privilege under section 552.111), 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the information at issue, which we marked, may not

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<sup>2</sup> As we are able to make this determination, we need not address the arguments against disclosure of this information.

be withheld under section 552.103 or section 552.111 of the Government Code. However, the Texas Supreme Court has held the Texas Rules of Civil Procedure are “other law” within the meaning of section 552.022. See *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Therefore, we will consider your assertion of the attorney work product privilege under Texas Rule of Civil Procedure 192.5 for the information subject to section 552.022. We will also address your arguments for the information not subject to section 552.022.

Rule 192.5 encompasses the attorney work product privilege. Rule 192.5 defines work product as:

- (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
- (2) a communication made in anticipation of litigation or for trial between a party and the party’s representative or among a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents.

TEX. R. CIV. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating the information was created or developed for trial or in anticipation of litigation by or for a party or a party’s representative. *Id.* 192.5; ORD 677 at 7-8. In order for this office to conclude the information was made or developed in anticipation of litigation, we must be satisfied that:

- a) a reasonable person would have concluded from the totality of the circumstances surround the investigation that there was a substantial chance that litigation would ensue; and
- b) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation.

*Nat’l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A “substantial chance” of litigation does not mean a statistical probability, but rather “that litigation is more than merely an abstract possibility or unwarranted fear.” *Id.* at 204; ORD 677 at 7.

The authority contends the information subject to section 552.022 constitutes attorney work product protected by rule 192.5 of the Texas Rules of Civil Procedure. Upon review, we find you have not demonstrated any of the information at issue consists of mental impressions, opinions, conclusions, or legal theories of an attorney or an attorney’s representative that were created for trial or in anticipation of trial. Therefore, the authority

may not withhold any of the information at issue under rule 192.5 of the Texas Rules of Civil Procedure.

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 the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (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. *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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a). *See* ORD 551 at 4.

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, a governmental body must furnish concrete evidence that litigation involving a specified 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, 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.<sup>3</sup> ORD 555; *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an

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<sup>3</sup> In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

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. 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 that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

You indicate the authority anticipated litigation on the date it received the request for information. You explain the authority and Texas Landfill Management (“TML”), a subsidiary of Texas Disposal Systems, entered into an agreement. You assert TML is operating in breach of the terms set out in the agreement and TML contests the assertion of breach by the authority. You explain the authority and TML have been attempting to come to terms regarding TML’s operations of the agreement, but negotiations have broken down and litigation is imminent for TML’s breach of contract. Based upon your representations and our review of the information, we determine you have established the authority reasonably anticipated litigation on the date it received the instant request for information. Further, we find the information at issue is related to the anticipated litigation. Therefore, the authority may withhold the remaining information not subject to section 552.022 of the Government Code pursuant to section 552.103(a) of the Government Code.<sup>4</sup>

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).

In summary, the authority must release the submitted audio recording of the public meeting pursuant to chapter 551 of the Government Code. The authority must release the information we marked pursuant to section 552.022(a)(3) of the Government Code. The authority may withhold the remaining responsive information under section 552.103(a) 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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG’s Open

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

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,

Kimbell Kesling  
Assistant Attorney General  
Open Records Division

KK/mo

Ref: ID# 827058

Enc. Submitted documents

c: Requestor  
(w/o enclosures)