



March 27, 2000

Ms. Linda Henry
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Executive offices
P.O. Box 2562
Houston, Texas 77252-2562

OR2000-1197

Dear Ms. Henry:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 133330.

The Port of Houston Authority (“PHA”) received a request for 21 items of information, primarily relating to the proposed Bayport Container Port. You asked the requestor to clarify certain items of the request, which he did, while adding items 22-28. *See* Gov’t Code § 552.222; Open Records Decision No. 663 (1999). You assert that information requested under items 7 and 17(d) does not exist. You state that you have made or will make available the information responsive to items 1, 2, 4, 8, 9, 11 (but for one document), 12, 14-16, and 22-24. You have not yet identified any information responsive to items 6, 10, or 21, but you state that you will release any information identified as responsive to those items. Although you have not yet identified information responsive to items 25 and 28, you seek to preserve a claim that information responsive to those items may be excepted from required public disclosure under sections 552.107 and 552.111 of the Government Code. You do claim that the remaining requested items of information are excepted from required public disclosure under sections 552.101, 552.103, 552.105, 552.107, 552.110, and 552.111. We have considered the exceptions you claim and reviewed the submitted information.¹

¹We assume that 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). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than those submitted to this office.

Regarding your statement that no information responsive to items 7 and 17(d) exists, we note that the Public Information Act (the "Act") does not require a governmental body to prepare new information in response to open records requests. Open Records Decisions Nos. 452 (1986), 342 (1982). Furthermore, the Act does not ordinarily require a governmental body to obtain new information to comply with a request. Open Records Decision 561 (1990). The Act only applies to information already in existence, so PHA need not respond to items 7 or 17(d), except to inform the requestor that there is no responsive information.

As to your concern that information you may identify in the future as responsive to items 25 or 28 may contain information excepted from required disclosure under section 552.107(1), and that information discovered in the "more than fifty (50) boxes of records" you are reviewing may be excepted from required disclosure under section 552.111, we are compelled to refer you to section 552.301(e) of the Act. Pursuant to section 552.301(e), a governmental body is required to submit to this office within fifteen business days of receiving an open records request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You did not, however, submit to this office representative samples of the information that was requested in items 25 or 28 of the request.

Pursuant to section 552.302 of the Government Code, a governmental body's failure to submit to this office the information required in section 552.301(e) results in the legal presumption that the information is public and must be released. Information that is presumed public must be released unless a governmental body demonstrates a compelling reason to withhold the information to overcome this presumption. *See Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). You have not shown such a compelling interest to overcome the presumption that the information at issue is public. Accordingly, you must release information you identify as responsive to items 25 and 28.

In addition, if the boxes of records you are reviewing contain information fairly represented by information submitted to this office to review, you must withhold or release that information according to whether this ruling requires you to withhold or release that type of information. To the extent that the boxes of records you are reviewing contain substantially different types of information than those submitted to this office to review, you will have missed the deadline to submit that information and so must release it. We caution that the distribution of confidential information constitutes a criminal offense. Gov't Code § 552.352.

We now turn to the items for which you do have responsive information and have submitted representative samples to us. You assert that items 3, 26, and 27 are excepted from required disclosure under section 552.105. You submitted representative samples of those requested items in Exhibits D, J, and K. Section 552.105 excepts from required public disclosure information "relating to"

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

This exception protects a governmental body's planning and negotiating position with respect to particular transactions; its protection is therefore limited in duration. Open Records Decision No. 357 (1982). To show the applicability of section 552.105, a governmental body must first make a good faith determination that the release of the information could damage its negotiating position with respect to the acquisition of property, subject to review by this office. Open Records Decision No. 564 (1990). Section 552.105(1) is generally inapplicable when the governmental body has publicly announced the project. Likewise, section 552.105(2) is generally inapplicable once the governmental body has entered into a final contract for the property at issue. Open Records Decision No. 222 (1979). You state that PHA "has made no final decision as to the entire project location," so that section 552.105(2) remains applicable.

When section 552.105 is applicable, it protects not only information showing the location of property, appraisal reports specific to that property, and purchase price of the property, but also related information. Open Records Decision No. 564 (1990). We have reviewed the information at issue and your arguments, and agree that you may withhold Exhibits D, J, and K, with the possible exception of the one document we have tabbed. That document appears to have been printed from a web site. If information has already been publicly disclosed, it ordinarily may not be withheld in the future. ORD 436 (1986); 435 (1986). Therefore, if the tabbed page has been made available to the public, such as through a publicly accessible web site, PHA must release it. Because we resolve the availability of Exhibits D, J, and K under section 552.105, we will not address your argument that release of some of that information would implicate the "privacy and property interests of third parties." We note, however, that this office did not receive additional arguments or briefs from any of the third parties you notified of the request for information.

You assert that section 552.103 of the Government Code excepts from disclosure the information responsive to item 13. You submitted representative samples of those requested items in Exhibit G-1. Section 552.103(a) reads 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.

The test for establishing that section 552.103(a) applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App.--Austin, 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 588 (1991). Litigation cannot be regarded as "reasonably anticipated" unless there is more than a "mere chance" of it -- unless, in other words, we have concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Whether litigation is reasonably anticipated must be determined on a case-by-case basis.

Litigation has been found to be reasonably anticipated when an individual has hired an attorney who demands damages and threatens to sue the governmental entity. Open Records Decision No. 551 at 2 (1990). You provide support that the potential opposing party in litigation has obtained counsel with substantial experience in litigation of the type you anticipate, and that that attorney has communicated to counsel for PHA an intent to sue. You have demonstrated that litigation is reasonably anticipated and that the information in Exhibit G-1 is related to that litigation. PHA may withhold under section 552.103 those portions of Exhibit G-1 we have marked and other documents not submitted to this office for which the documents we have marked are representative samples.

However, if the opposing party in the litigation has seen or had access to any of the information in these records, there is no section 552.103(a) interest in withholding that information from the requestor. Open Records Decision Nos. 349 (1982), 320 (1982). We have identified two items in Exhibit G-1 which have previously been publicly available. PHA must release those two items. PHA must release other documents not submitted to this office for which the documents we have marked to release are representative samples.²

Finally we address your claim that Exhibits E, F, H, and I, responsive to items 5, 11(part), 17(part), 18, 19, and 20, are excepted from disclosure by the attorney-client privilege under either section 552.101 or section 552.107. Section 552.101 protects information that is considered to be confidential by law, either constitutional, statutory, or by judicial decision. This office has concluded that section 552.107, and not section 552.101, governs a claim that requested information represents a protected attorney-client communication. *See* Open

² We note that the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

Records Decision No. 575 at 2 (1990) (construing predecessor statute). Section 552.107(1) excepts information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. *Id.* at 5. When communications from attorney to client do not reveal the client's communications to the attorney, section 552.107 protects them only to the extent that such communications reveal the attorney's legal opinion or advice. *Id.* at 3. Section 552.107(1) does not protect purely factual information. *Id.* After careful review, we agree that portions of the requested documents in Exhibits E, F, H, and I are excepted from disclosure under the attorney-client privilege. We have marked the information you must withhold under section 552.107(1). The remaining information in those exhibits must be released to the requestor.

In summary, PHA must withhold the information we have marked in Exhibits E, F, H, and I, and may withhold the marked information in Exhibit G-1, and the information in Exhibits D, J, and K, with the possible exception of the tabbed document. PHA must release any information responsive to items 25 and 28, any information we have not marked to withhold, and all information in the additional boxes of records not represented by a sample of information submitted to this office to review. Information in the boxes of records which is represented by a sample of information submitted to this office to review must be withheld or released according to this ruling's treatment of that type of information.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be

provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Patricia Michels Anderson
Assistant Attorney General
Open Records Division

PMA/jc

Ref: ID# 133330

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