



May 18, 2000

Mr. John Steiner  
Division Chief  
Law Department  
City of Austin  
P.O. Box 1546  
Austin, Texas 78767-1546

OR2000-1978

Dear Mr. Steiner:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 135326.

The City of Austin (the "city") received a request for the following information:

Copies of all correspondence, contracts, or agreements between the [city] and Patton, Boggs, L.L.P.

Copies of all correspondence, contracts, or agreements between the [city] and the Holly Corporation and the Navajo Refining Company.

Copies of all correspondence, contracts, or agreements between the [city] and the law firm of George, Donaldson, & Ford regarding Longhorn pipeline.

You state that some of the information responsive to the request "will be made available to the requestor." You have provided for our review representative samples of additional information that is responsive to the request. You assert that this information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you assert and reviewed the submitted information.<sup>1</sup>

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<sup>1</sup>In reaching our conclusion here, we assume that the representative sample of records submitted to this office is truly representative of the requested records as a whole that you seek to withhold. *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.

In relevant part, 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.

A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. 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).

As to the first prong, litigation must be pending or reasonably anticipated on the date that the information is requested. Gov't Code § 552.103(c). In this instance, we agree that you have demonstrated that, on the date that the request at issue was received by the city, litigation was pending in the case of *Ethel Spiller, et. al. v. Robert M. Walker, et. al.*, No. A-98-CA-255-SS in the United States District Court for the Western District of Texas, Austin Division. As to the second prong, we believe that you have made the requisite showing that the requested information relates to litigation for purposes of section 552.103(a). Except as noted below, we accordingly determine that the requested records may be withheld from public disclosure pursuant to section 552.103.

We note that if the opposing parties in the litigation have 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 marked with green flags those documents that appear to have been made available to all parties in the pending litigation. Many of these documents are also indicated to have been filed with a court. See Gov't Code § 552.022(a)(17) (unless confidential under other law, information that is also contained in a public court record is not excepted from required disclosure); see also *Star-Telegram, Inc. v. Walker*, 834 S.W.2d 54, 57 (Tex. 1992) (documents filed with a court are generally considered public and must be released). Thus, any of the responsive information that has been made available to the opposing parties in the pending litigation, including the information filed with a court, is not excepted from disclosure by section 552.103.<sup>2</sup> We have also marked with blue flags documents that contain

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<sup>2</sup>We have also marked with yellow flags those documents that appear to have been made available to a member of the public, or that appear to have been made available to the opposing parties in the pending litigation. If any of these documents have either been released to a member of the public or already been made available to the opposing parties, you must release such documents to the requestor. See Gov't Code

information that is within the public domain, such as newspaper articles and news clippings. Information that is within the public domain, whether or not it relates to the pending litigation, cannot be withheld under section 552.103.<sup>3</sup>

As to the information that is excepted from disclosure under section 552.103, we caution 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). However, if the records contain information that is confidential by law, you must not release such information even at the conclusion of the litigation. Gov't Code §§ 552.101, .352. In light of our conclusion under section 552.103, we need not address the applicability of other exceptions you have asserted, except to state that the information made available to the opposing parties, found in public court records, or released to the public domain is not excepted from disclosure under section 552.101, 552.107, or 552.111.

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

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§ 552.007(b); Open Records Decision No. 463 at 1-2 (1987) (prohibiting the selective disclosure of information that has been released to the public).

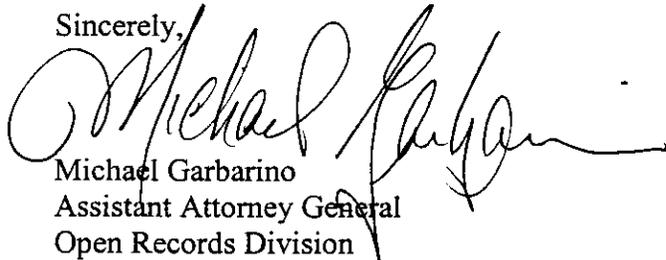
<sup>3</sup>Some of this information is indicated to be copyrighted. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). However, a governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

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,

A handwritten signature in black ink, appearing to read "Michael Garbarino". The signature is fluid and cursive, with a long horizontal stroke at the end.

Michael Garbarino  
Assistant Attorney General  
Open Records Division

MG/ljp

Ref: ID# 135326

Encl. Submitted documents

cc: Mr. Christian Davenport  
Austin American-Statesman  
P.O. Box 670  
Austin, Texas 78704  
(w/o enclosures)