



January 17, 2001

Mr. Rene Ruiz  
Matthews and Branscomb  
112 East Pecan, Suite 1100  
San Antonio, Texas 78205

OR2001-0176

Dear Mr. Ruiz:

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# 143265.

The City of San Antonio (the "city"), which you represent, received on October 20, 2000 a request for the following information:

From the information required to be maintained under the National Flood Insurance Program, section 60.3 by the city Flood Plain Administrator, all flood plain development permits issued by the city including the reason for the issuance and any construction done by the city or its contractors in Zones A or AE.

By separate correspondence received by the city on December 6, 2000, the requestor also requested:

Copies of all records of construction required to be maintained under section 60.3 and 59.22 of the National Flood Insurance Program Regulations.

You have submitted for our review, as representative samples of the information responsive to the requests, duplicate copies of the same information.<sup>1</sup> You assert that the requested information is excepted from disclosure under section 552.103 of the Government Code. The requestor has also submitted comments to this office. *See* Gov't Code § 552.304. We have considered the exception you claim, and we have reviewed the submitted comments and the submitted information.

At the outset, we must address whether the procedural requirements of the Act have been met in this instance. Section 552.301 provides in relevant part:

(d) A governmental body that requests an attorney general decision under Subsection (a) must provide to the requestor within a reasonable time but not later than the 10th business day after the date of receiving the requestor's written request:

(1) a written statement that the governmental body wishes to withhold the requested information and has asked for a decision from the attorney general about whether the information is within an exception to public disclosure; and

(2) a copy of the governmental body's written communication to the attorney general asking for the decision or, if the governmental body's written communication to the attorney general discloses the requested information, a redacted copy of that written communication.

The requestor contends with reference to the request received October 20, 2000 that the city failed to comply with the requirements of section 552.301(d) in two respects. First, the requestor states that the city did not enclose a copy of the city's communication to this office asking for a decision, as required by the above-quoted subsection 552.301(d)(2). Second, the requestor contends that the city did not comply with the above-quoted ten business day deadline.

You represent to this office that a copy of your initial correspondence to this office was enclosed in the correspondence sent to the requestor pursuant to section 552.301(d). In the open records ruling process, this office is unable to resolve disputes of fact. We accordingly rely upon your representation that the city complied with subsection 552.301(d)(2). Section 552.308 of the Act provides in relevant part:

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<sup>1</sup>We 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). This open records letter does not reach any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

(a) When this subchapter requires a request, notice, or other document to be submitted or otherwise given to a person within a specified period, the requirement is met in a timely fashion if the document is sent to the person by first class United States mail properly addressed with postage prepaid and:

- (1) it bears a post office cancellation mark indicating a time within that period; or
- (2) the person required to submit or otherwise give the document furnishes satisfactory proof that it was deposited in the mail within that period.

You have submitted to this office sworn affidavits indicating that the correspondence to the requestor that was sent pursuant to section 552.301(d) was deposited in the mail on November 2, 2000, the tenth business day after the city's receipt of the October 2000 request for the information at issue. The city and the requestor dispute whether the item was properly addressed, and also dispute whether the item was returned and redeposited in the mail by the city, or instead corrected and the postage re-applied by the postal service. We are unable to resolve these factual disputes, and again, we must rely on the city's representations indicating that the city complied with the timeliness requirement of section 552.301(d).

The requestor also states with respect to the request received by the city on December 6, 2000 that the same request was sent by her to the city on December 3, 1997, and that the city never responded to the 1997 request. In response, you state:

The information [the requestor] claims was requested in December 1997 is not the same information that has been requested in the request dated October 20, 2000. Therefore, the December 1997 request should be considered a separate request that has no relevance or bearing [to the October 20, 2000 request]. Additionally, [the requestor's] failure to actively pursue the request made three years ago should act to estop or waive [the requestor's] claims flowing from that request. At best the request is stale if not wholly unsubstantiated.

While we acknowledge your representation that the two requests do not seek the same information, we note that in asserting section 552.103 of the Act, you provided to this office as responsive to the December 2000 request precisely the same information as you indicate to be responsive to the October 2000 request. In addition, because the December 1997 and December 2000 requests both seek copies "of all records of construction . . ." we think the responsive information would include the "flood plain development permits issued by the city including the reason for the issuance and any construction done by the city or its contractors in Zones A or AE." See Open Records Decision No. 561 at 8 (1990) (a

governmental body must make a good faith effort to relate a request to information which it holds). The requestor has submitted to this office a copy of the request dated December 3, 1997, and in a sworn affidavit, states that the request was *sent* on that date to Mr. John German, the same individual to whom the October and December 2000 requests were directed. You state, as quoted above, that the December 1997 request is “unsubstantiated,” and we thus have no indication that the 1997 request was *received* by the city. If the request was in fact *received* by the city, we do not agree with your argument that the requestor “waived” any right to the information responsive to the December 1997 request by her failure to earlier “actively pursue” the request. A governmental body’s duty to request a decision of this office, if it seeks to withhold the responsive information, is triggered upon receipt of a written request for information. Open Records Decision No. 304 (1982). As we are unable to resolve the factual dispute of whether the December 1997 request was received by the city, this decision does not address that request. In light of the factual representations made by the city on which we must rely, we accordingly proceed to address the section 552.103 assertion with respect to the October and December 2000 requests.

Section 552.103 excepts from disclosure 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.

[Information is excepted from disclosure] 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). Section 552.103 was intended to prevent the use of the Act as a method of avoiding the rules of discovery in litigation. Attorney General Opinion JM-1048 at 4 (1989). The litigation exception enables a governmental body to protect its position in litigation by requiring information related to the litigation to be obtained through discovery. Open Records Decision No. 551 at 3 (1990). To show that the litigation exception is applicable, the city must demonstrate that (1) litigation was pending or reasonably anticipated at the time of the request and (2) the information at issue is related to that litigation. *See* Gov’t Code § 552.103(a), (c); *see also 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). You assert that litigation involving the city is pending, and was pending at the time of the city’s receipt of the October and December 2000 requests.<sup>2</sup>

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<sup>2</sup>The city and the requestor dispute whether the requestor has made the requests at issue on behalf of the plaintiffs in the pending litigation. We note that this issue is irrelevant to whether the information is excepted from disclosure under section 552.103. Indeed, if any of the responsive information is voluntarily made available under the Act to any member of the public by the city, including the requestor, such information may not then be withheld by the city pursuant to section 552.103 of the Act. *See* Gov’t Code § 552.007.

In support of this assertion, you have submitted for our review copies of pleadings in the matter. As to the second prong of the above-stated test, upon careful review of the submitted information and supporting documentation, we also find that the requested information relates to the pending litigation. Thus, based on the factual assertions made by the city and except as otherwise noted herein, the city may withhold the responsive information pursuant to section 552.103 of the Act.

Absent special circumstances, once information has been obtained by all parties to the litigation, *e.g.*, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, to the extent the opposing parties in the pending litigation have seen or had access to any of the information responsive to the request, there is no justification for withholding that information from the requestor pursuant to section 552.103. In this instance, we have no indication that the opposing parties in the pending litigation have seen or previously been granted access to any of the information responsive to the request. We also note, however, that the applicability of section 552.103 ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

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).

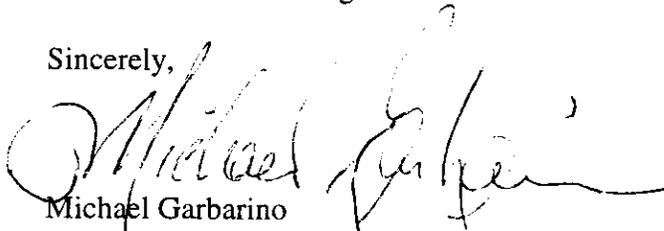
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

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,



Michael Garbarino  
Assistant Attorney General  
Open Records Division

MG/seg

Ref: ID# 143265

Encl. Submitted documents

cc: Ms. Jane Schafer  
8620 North New Braunfels, Suite 400  
San Antonio, Texas 78217  
(w/o enclosures)