



August 22, 2001

Mr. James H. Owen
County Attorney
Henderson County
Henderson County Courthouse, Room 10
Athens, Texas 75751

OR2001-3717

Dear Mr. Owen:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 150982.

The Henderson County Attorney's Office (the "county attorney") received a request for various documents and tape recordings pertaining to a specified request for proposal. The county attorney claims that the submitted information is excepted from disclosure pursuant to section 552.103 of the Government Code. We have considered the claimed exception and have reviewed the submitted information.

We note at the outset that the county attorney indicates that it did not submit any audiotapes to us for review because they may not exist.¹ We also note that the county attorney did not submit to us any information that is responsive to item five of the request for information, which asks for "[a]ll written transcripts, cassette recordings or tape recordings of the April 2, 2001 meeting of the Henderson County Commissioner's Court." To the extent that the county attorney maintains information that is responsive to the request for all written transcripts, we conclude that he must provide that information to the requestor at this time. *See Gov't Code §§ 552.006, .301, .302; see also Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible under circumstances).*

Next, we note that section 552.022 of the Government Code makes certain information public, unless it is expressly confidential under other law. One category of public information under section 552.022 is information in an account, voucher, or contract relating

¹ It is implicit in several provisions of the Public Information Act (the "Act") that the Act applies only to information already in existence. *See Gov't Code §§ 552.002, .021, .227, .351.*

to the receipt or expenditure of public or other funds by a governmental body. *See* Gov't Code § 552.022(a)(3). Several of the submitted documents, which we have marked, constitute contracts relating to the receipt or expenditure of public or other funds by a governmental body, namely Henderson County. The county attorney claims that these marked documents are excepted from disclosure pursuant to section 552.103 of the Government Code. However, section 552.103 is a discretionary exception under the Public Information Act and, as such, does not make information confidential.² Consequently, since the county attorney claims no other exceptions to disclosure regarding this information, he may not withhold any of it from disclosure pursuant to section 552.103 of the Government Code. Accordingly, the marked documents must be released to the requestor.

The county attorney claims that the remaining submitted information is excepted from disclosure pursuant to section 552.103 of the Government Code. Section 552.103 provides in pertinent part:

(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. The county attorney has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *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

² Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.*, Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

(1990). The county attorney must meet both prongs of this test for information to be excepted under section 552.103(a). Further, the litigation must be pending or reasonably anticipated on the date that the information is requested. *See* Gov't Code § 552.103(c).

The county attorney states, and provides documentation showing, that Henderson County is a party to a suit that is currently pending. Therefore, based on the county attorney's representation and our review of the submitted information, we conclude that the county attorney has demonstrated that Henderson County was involved in pending litigation prior to the county attorney's receipt of the request for information. We also find that the county attorney has adequately explained how the submitted information relates to the subject matter of the pending litigation. Therefore, we conclude that the submitted information is excepted from disclosure pursuant to section 552.103 of the Government Code. We note that 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 the opposing party in 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 county attorney must release the marked documents contained within the submitted information pursuant to section 552.022(a)(3) of the Government Code. The county attorney may withhold the remaining submitted information from disclosure pursuant to section 552.103 of the Government Code.

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;

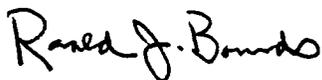
2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things 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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/seg

Ref: ID# 150982

Enc. Marked documents

cc: Ms. Susan M. Halpern
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(w/o enclosures)