



August 9, 2002

Ms. Anne M. Constantine
Legal Counsel
Dallas-Fort Worth International Airport Board
P.O. Box 619428
DFW Airport, Texas 75261-9428

OR2002-4387

Dear Ms. Constantine:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 166900.

The Dallas-Fort Worth International Airport Board (the "board") received a request for the following information: results of water tests performed between October 2001 and May 2002; any studies, reports or e-mails produced about the airport's waste and stormwater collection system during the last year; any correspondence with the Texas Natural Resource Conservation Commission ("TNRCC") since June 2001; any capital improvement proposals pertaining to the collection system; and the records detailing disposal of deicing fluids, including volume and destination. You claim that the requested information is excepted from disclosure under 552.103 of the Government Code. We have considered your arguments and reviewed the submitted representative sample of information.¹

Initially, we note that you have not submitted to our office for review, nor do you inform us that you have released to the requestor, any correspondence with the TNRCC. Therefore, if in fact any such responsive correspondence exists, you must immediately release such

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). 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.

information to the requestor if you have not already done so. *See* Gov't Code §§ 552.006, .301(a), .302.

Next, we note that a portion of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides that

the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

- (1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). Much of the submitted information consists of completed reports. Section 552.022(a)(1) requires the release of the completed reports that we have marked unless the information is expressly confidential under other law or excepted under section 552.108. Section 552.103, which you raise, is not "other law" for purposes of section 552.022. Thus, the marked information may not be withheld under section 552.103 and must be released to the requestor, with the following exception.² *See* Open Records Decision Nos. 542 (1990) ("litigation exception" does not implicate third party rights and therefore is waivable by a governmental body).

The information subject to release under section 552.022 contains e-mail addresses that may be subject to section 552.137 of the Government Code. Section 552.137 makes certain e-mail addresses confidential and provides in pertinent part:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

²We note that a portion of the information subject to section 552.022 is marked "Privileged and Confidential Attorney-Client Work Product Communication." However, you make no arguments to this office in support of this assertion. Thus, we are unable to determine that the information is protected either as a confidential attorney-client communication or as attorney work product. *See* Gov't Code §§ 552.301(b), .301(e)(1)(A), .302.

Gov't Code § 552.137. Accordingly, unless the member of the public in question has affirmatively consented to its release, the board must withhold the e-mail address that we have marked from disclosure pursuant to section 552.137.

For the remainder of the submitted information not subject to section 552.022, we will address your argument under section 552.103. Section 552.103 provides 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.

The board 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 on the date the governmental body receives the request for information, 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, 481 (Tex. App.--Austin 1997, no pet.); *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). The board must meet both prongs of this test for information to be excepted under 552.103(a).

You inform us that the board was served with a lawsuit on December 21, 2000 for alleged environmental violations relating to the stormwater collection systems, among other things. In support of this assertion, you submitted a copy of a second amended petition filed in this lawsuit on April 21, 2001 in the United States District Court for the Northern District of Texas. You state that the litigation is still pending at this time and that none of the requested information has been produced in discovery. On this basis, we find that you have established that litigation involving the board was pending on the date the board received the records request. Upon review of the petition and the submitted information, we find that the information is related to the litigation for purposes of section 552.103. Therefore, under section 552.103, the board may withhold the remainder of the submitted information not subject to section 552.022(a)(1).

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. 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 it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

To summarize, the board must release the information we have marked under section 552.022(a)(1), with the exception of the marked e-mail address, which must be withheld under section 552.137 unless the owner has affirmatively consented to its release. The board may withhold the remainder of the submitted information under section 552.103.

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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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 A. Pearle
Assistant Attorney General
Open Records Division

MAP/jh

Ref: ID# 166900

Enc. Submitted documents

c: Mr. Miles Moffeit
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(w/o enclosures)