



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

January 23, 2003

Ms. Meredith Ladd
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1717 Main Street, Suite 4300
Dallas, Texas 75201

OR2003-0475

Dear Ms. Ladd:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 175357.

The City of McKinney (the "city"), which you represent, received a request for three categories of information regarding an area annexed by the city in 1999. You inform us that you sought clarification of the request from the requestor. *See* Gov't Code § 552.222 (providing that a governmental body may ask the requestor to clarify the request if what information is requested is unclear to the governmental body); *see also* Open Records Decision No. 663 at 5 (1999) (discussing requests for clarification). The requestor responded on October 28, 2002. In the clarified request, the requestor asks for: 1) complete water and sewer construction plans for the area annexed by the city under ordinance number 99-10-77, along with public bid information for the construction of water and sewer lines in the annexed area; 2) the total cash value of certificates of obligation issued by the city for fiscal years 2001 and 2002, and the names of persons receiving payments; 3) any reports or complaints made to the city administration or police department regarding the McKinney Police Shooting Range from January, 2000, through October 15, 2002. Furthermore, you inform us that the city received an additional request concerning the certificates of obligation on November 13, 2002. The additional request asks for a list of all certificates of obligation issued by and for the city during fiscal years 2001 and 2002, including the amount of obligation, the project for which the obligation was made, the names of persons receiving payments, and the date of payment. Finally, on December 5, 2002, the city received thirteen additional requests for the same information requested in the November 13, 2002 request. You claim that the requested information is excepted from disclosure under section 552.103

of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.¹

First, you state that the city has no documents responsive to category 3 of the October 28 request. Chapter 552 of the Government Code does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App. – San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

Next, you have included a copy of city ordinance number 99-10-77 in the submitted sample of information you seek to withhold. We note that the ordinance is subject to required public disclosure under section 552.022 of the Government Code, which provides in relevant part:

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:

(10) a substantive rule of general applicability adopted or issued by an agency as authorized by law, and a statement of general policy or interpretation of general applicability formulated and adopted by an agency;

...

(15) information regarded as open to the public under an agency's policies[.]

The city ordinance falls within the scope of sections 552.022(a)(10) and 552.022(a)(15). Therefore, as prescribed by section 552.022, the city must release the ordinance unless it is confidential under other law. Section 552.103 of the Government Code is a discretionary exception to disclosure that protects the governmental body's interests and is therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103). Thus, the city must release the ordinance to the requestor. Gov't Code § 552.022; *see also* Open Records

¹ 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, 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.

Decision No. 551 at 3 (1990) (in accordance with due process notice requirements, city ordinance not excepted from disclosure under litigation exception).

We next address your claim under section 552.103 of the Government Code with respect to the remainder of the submitted information. Section 552.103 of the Government Code 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.

A governmental body 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 was pending or reasonably anticipated on the date the governmental body received 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). A governmental body must meet both prongs of this test for information to be excepted under 552.103(a).

You state that the city is presently a named defendant in a lawsuit regarding the annexation. You inform us that the current litigation was filed on October 23, 2002, and you have submitted a copy of the Plaintiff's Original Petition for Writ of Mandamus for our review. You further advise that an appeal of a previous lawsuit against the city pertaining to the annexation is currently pending before the United States Court of Appeals for the Fifth Circuit, and you have submitted the Plaintiff-Appellant's brief in that case for our review. Thus, we find the city has demonstrated that litigation was pending on the date the city received the present request for information. Upon review, we determine that the submitted water and sewer construction plans and documents are related to the pending litigation. Therefore, the city may withhold the marked plans and documents under section 552.103 of the Government Code. However, the city has not demonstrated that the submitted information regarding certificates of obligation issued in 2001 and 2002 are related to the pending litigation. We therefore conclude that this information, which we have marked, may

not be withheld under section 552.103 and must be released to the requestor. *See* Open Records Decision Nos. 638 (1996), 551 (1990).

We also 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. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all opposing parties in all the pending lawsuits 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).

In summary, the submitted water and sewer construction plans and documents may be withheld under section 552.103 of the Government Code. The remainder of the responsive information must be released to the requestor.

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,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 175357

Enc: Submitted documents

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