



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 29, 2004

Ms. Melissa L. Barloco
Assistant County Attorney
Harris County
1019 Congress, 15th Floor
Houston, Texas 77002-1700

OR2004-6392

Dear Ms. Barloco:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 206235.

The Harris County Toll Road Authority (the "authority") received a request for three items of information concerning the Westpark Tollway Construction Project: 1) any and all daily diaries, daily logs, activity logs or progress reports created during the course of the project; 2) any and all utility logs, utility diaries, utility reports, or utility records created during the course of the project; and 3) any and all correspondence, including internal memoranda, relating to the project. You state that the authority is releasing to the requestor information that is responsive to the second item of requested information. You claim that the remaining requested information is excepted from disclosure under section 552.103 of the Government Code.¹ We have considered the exception you claim and reviewed the submitted information, which you say is a representative sample of the information the authority seeks to withhold from disclosure.²

¹In your first correspondence to this office on this matter, you raised sections 552.101, 552.107 and 552.111 of the Government Code. In your subsequent correspondence, you do not provide arguments to support your assertion of sections 552.101 and 552.107. Consequently, we understand that the city has withdrawn its section 552.101 and section 552.107 claims. Furthermore, you state that the city wishes to withdraw its assertion of section 552.111. We therefore do not address the applicability of these three exceptions to the information at issue.

²We 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.

We note that the submitted information includes information that is subject to section 552.022 of the Government Code. Section 552.022(a) enumerates categories of information that are public information and not excepted from required disclosure under chapter 552 of the Government Code unless they are expressly confidential under other law. The submitted documents include information in two section 552.022 categories: 1) "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a government body;" and 2) "all working papers, research material, and information used to estimate the need for or expenditure for public funds or taxes by a governmental body, on completion of the estimate." See Gov't Code § 552.022(a)(3), (5). This information must therefore be released under section 552.022 unless the information is expressly made confidential under other law. Section 552.103 of the Government Code, the litigation exception, is a discretionary exception under the Public Information Act and does not constitute "other law" for purposes of section 552.022. See Open Records Decision Nos. 591 at 2 n. 2 (1991); 473 (1987). We have marked the information that is subject to release under section 552.022.

For the remaining information, we will consider your section 552.103 claim. 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.

Gov't Code § 552.103. The authority 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. *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 authority must meet both prongs of this test for information to be excepted under section 552.103(a).

You state that litigation involving Harris County (the "county") was pending on the date the county received the request and that this litigation is currently pending. You have submitted

to this office a copy of Defendant's First Amended Original Answer, Counterclaim and Third Party Petition in the case of *NSPOF Communications, Inc. v. Deavers Construction, LP., d/b/a Jones Contractors, L.P. v. Harris County, Tex.*, No. 2003-45939 (164th Dist. Ct., Harris County, Texas). You state that in this lawsuit, plaintiff is alleging damages incurred due to Jones Contractors' construction activities related to the construction project. You state that Jones Contractors alleges that the county did not make necessary arrangements with the plaintiff regarding the moving of utility lines.

After review of the information and consideration of your arguments, we conclude that you have shown that the requested information is related to pending litigation to which the county is a party. Accordingly, with the exception of the information that is subject to section 552.022, the authority may withhold the information based on section 552.103.

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).

In summary, the authority must release the information we have marked as subject to required public release under section 552.022 of the Government Code. The authority may withhold the remaining information from disclosure to the extent the opposing party has not had access to it.

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,

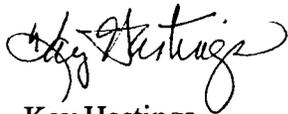
the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge 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 Dep't of Pub. 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,



Kay Hastings
Assistant Attorney General
Open Records Division

KH/seg

Ref: ID# 206235

Enc: Submitted documents

c: Mr. John M. Madison, III
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(w/o enclosures)