ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 6, 2004

Mr. Clark T. Askins
Assistant City Attorney
City of La Porte
Askins & Armstrong, P.C.
P. O. Box 1218
La Porte, Texas 77572-1218

OR2004-6661

Dear Mr. Askins:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 206875.

The City of La Porte (the "city"), which you represent, received a request for information relating to a specified address. You state that the city will provide the requestor with some of the requested information. You claim that the remaining requested information is excepted from disclosure pursuant to section 552.103 of the Government Code. We have considered the exception you claim and have reviewed the submitted information.

Initially, we note that a portion of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 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). The submitted information includes a completed report made of, for, or by the city that is subject to section 552.022(a)(1). Thus, the city must release this completed report to the requestor, unless it is excepted from disclosure under section 552.108

of the Government Code or expressly confidential under other law.[1] Although the city claims that this completed report is excepted from disclosure under section 552.103 of the Government Code, we note that section 552.103 is a discretionary exception to disclosure under the Public Information Act (the "Act") that does not constitute "other law" for the purposes of section 552.022.[2] Accordingly, we conclude that the city may not withhold any portion of this completed report under section 552.103 of the Government Code. Consequently, the city must release the completed report that we have marked to the requestor.

You claim that the remaining submitted information is excepted from disclosure pursuant to section 552.103 of the Government Code. Section 552.103 provides in 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(a), (c). The city maintains the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold from disclosure. To meet this burden, the city must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request and (2) that the information at issue is related to that litigation. *See University of Tex. Law*

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[1] We note that the city does not claim that any portion of the submitted information is excepted from disclosure under section 552.108 of the Government Code.

[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), 522 at 4 (1989) (discretionary exceptions in general), 473 (1987) (governmental body may waive statutory predecessor to section 552.111); *see also Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.–Dallas 1999, no pet.) (governmental body may waive section 552.103). Discretionary exceptions, therefore, do not constitute "other law" for purposes of section 552.022 of the Government Code.

Sch. v. Texas Legal Found., 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See id.*

You state, and provide documentation showing, that the submitted information relates to litigation involving the city as a party that was pending on the date that the city received this request for information. Based on your arguments and our review of the remaining submitted information, we, thus, agree that section 552.103 of the Government Code applies to this information.

However, 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 pending litigation is not excepted from disclosure under section 552.103(a) and may not be withheld from disclosure on that basis.[3] In this regard, we note that portions of the remaining submitted information have been seen by the opposing party in the pending litigation. Accordingly, we conclude that, with the exception of the information that has been seen by the opposing party in the pending litigation, the city may withhold the remaining submitted information pursuant to section 552.103 of the Government Code. The information that has been seen by the opposing party in the pending litigation must be released to the requestor.

In summary, the city must release the completed report that we have marked to the requestor pursuant to section 552.022(a)(1) of the Government Code. With the exception of the information that has been seen by the opposing party in the pending litigation and that also must be released, the city may withhold the remaining submitted information 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

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[3] 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).

have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

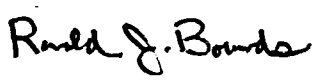
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following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



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/krl

Ref: ID# 206875

Enc. Marked documents

c: Anca Adams
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Houston, Texas 77055
(w/o enclosures)