



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 7, 2005

Mr. Brody Shanklin
Assistant District Attorney
Denton County
P.O. Box 2850
Denton, Texas 76202

OR2005-06013

Dear Mr. Shanklin:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 226726.

Denton County (the "county") received a request for information pertaining to the development and construction of a road in Denton County.¹ You claim that some of the submitted information is not subject to the Act. You also claim that other submitted information is excepted from disclosure under section 552.103 of the Government Code.² In addition, pursuant to section 552.305 of the Government Code, you have notified various interested third parties of the request and of their opportunity to submit comments to this office.³ See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision

¹As you have not submitted a copy of the request for information, we take our description of the request from your brief.

²Although you also initially raised sections 552.101, 552.105, 552.107, 552.109, 552.110, 552.111, 552.113, 552.131, 552.133, and 552.137 as possible exceptions to disclosure, you have not indicated that any of the submitted information falls within these exceptions and have provided no arguments regarding such exceptions. We therefore assume you are no longer claiming these exceptions. See Gov't Code § 552.301.

³Your correspondence with this office reflects that you contacted the following third parties: Texas Motor Speedway, Omar Harvey, and Fort Worth Sports Authority, Inc.

No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). On behalf of the Texas Department of Transportation (“TXDOT”), the Office of the Attorney General argues that the submitted information is excepted from disclosure by sections 552.103 and 552.105 of the Government Code. We have considered all of the arguments and reviewed the submitted information.

We first address your assertion that Exhibit F constitutes a record of the judiciary. The Act generally requires the disclosure of information maintained by a “governmental body.” See Gov’t Code § 552.021. While the Act’s definition of a “governmental body” is broad, it specifically excludes “the judiciary.” See Gov’t Code § 552.003(1) (A), (B). Therefore, information that is held by or on behalf of the judiciary is not subject to the Act. For example, in Open Records Decision No. 646 (1996), this office determined that a community supervision and corrections department is a governmental body for purposes of the Act, and that its administrative records, such as personnel records and other records reflecting day-to-day management decisions, are subject to the Act. *Id.* at 5. On the other hand, we also ruled that specific records regarding individuals on probation and subject to the direct supervision of a court that are held by a community supervision and corrections department are not subject to the Act because such records are held on behalf of the judiciary. *Id.*; see Gov’t Code § 552.003. In this instance, the records are held by the county and not the judiciary. Furthermore, the county does not inform us, and the information at issue does not indicate, that the county holds Exhibit F on behalf of the judiciary. We therefore find that Exhibit F is subject to the Act and may not be withheld unless an exception to disclosure under the Act applies.

We next address the county’s obligations under section 552.301 of the Government Code. Section 552.301 prescribes procedures that a governmental body must follow in asking this office to decide whether requested information is excepted from public disclosure. Section 552.301(e) provides in part:

(e) A governmental body that requests an attorney general decision . . . must . . . not later than the 15th business day after the date of receiving the written request [for information]:

(1) submit to the attorney general:

...

(B) a copy of the written request for information[.]

Gov’t Code § 552.301(e)(1)(B). In this instance the county has failed to submit a copy of the written request for information. Consequently, we conclude the county failed to comply with the requirements of subsection 552.301(e) of the Government Code.

According to section 552.302 of the Government Code, a governmental body's failure to comply with section 552.301 results in the legal presumption that the requested information is public and must be released unless a compelling reason exists to withhold the information from disclosure. *See* Gov't Code § 552.302; *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.—Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982). Generally, a governmental body may demonstrate a compelling reason to withhold information by a showing that the information is made confidential by another source of law or affects third party interests. *See* Open Records Decision No. 630 (1994). Section 552.103 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived by the governmental body. *See 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 Gov't Code § 552.103); Open Records Decision No. 177 (1977) (governmental body may waive statutory predecessor to section 552.103); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the county's claim under section 552.103 does not constitute a compelling reason to withhold information, and none of the requested information may be withheld on this basis. However, this office finds that TXDOT's claims under sections 552.103 and 552.105 can provide compelling reasons to overcome the presumption of openness and will address TXDOT's arguments. *Compare* Open Records Decision No. 586 at 3 (1991) (finding need of another governmental body to withhold information on basis of predecessor to section 552.108 to provide compelling reason to withhold information).

We next note that the submitted information contains minute orders that were approved by the Texas Transportation Commission in an open meeting. The minute order is an official record of a public proceeding which must be disclosed. Open Records Decision No. 221 at 1 (1979) ("official records of the public proceedings of a governmental body are among the most open of records"). Thus, you must release the minute orders that we have marked.

We also note that portions of the remaining submitted information are 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:

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body;

...

(17) information that is also contained in a public court record[.]

Gov't Code § 552.022(a)(3), (17). Exhibit C includes a contract relating to the expenditure of public funds, and Exhibit F consists of a court-filed document. Such information must be released under section 552.022, unless it is expressly confidential under other law. Although TXDOT claims that this information is excepted from disclosure pursuant to sections 552.103 and 552.105 of the Government Code, we note that these sections are discretionary exceptions to disclosure under the Act that protect the governmental body's interests and may be waived. *See 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 Gov't Code § 552.103); Open Records Decision No.564 (1990) (governmental body may waive statutory predecessor to section 552.105); Open Records Decision No. 177 (1977) (governmental body may waive statutory predecessor to section 552.103); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, sections 552.103 and 552.105 are not other law that makes information confidential for the purposes of section 552.022. Accordingly, we conclude that none of the information that is subject to section 552.022 may be withheld pursuant to these exceptions.

The county asserts that release of the requested information could affect third party rights. An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, none of the third parties have submitted to this office any reasons explaining why the information should not be released. We thus have no basis for concluding that any portion of the submitted information constitutes proprietary information, and none of it may be withheld on that basis. *See, e.g.,* Gov't Code § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). As we have not been cited to and are not aware of any law that makes confidential the information that is subject to section 552.022, this information must be released.

We now turn to TXDOT's arguments under section 552.103 of the Government Code for the remaining submitted information which is not subject to section 552.022 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). 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 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. *Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *Univ. of Tex. Law Sch. v. Tex. 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 governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

In order to establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

In this instance, TXDOT indicates and provides documentation showing that, prior to the county's receipt of this request for information, an offer to purchase was sent and was not accepted. TXDOT further indicates that, prior to the receipt of the request, the Office of the Attorney General was asked to file suit to acquire the property. Based on TXDOT's representations and the supporting documents, we conclude that TXDOT has shown that litigation was reasonably anticipated when the county received this request. In addition, based on TXDOT's representations and our review of the remaining submitted information, we agree that the remaining submitted information is related to the anticipated litigation for purposes of section 552.103(a). Thus, TXDOT has demonstrated the applicability of 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, responsive information to which all of the parties in the anticipated litigation have had access 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 concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the county must release the minute orders we have marked. The county must release Exhibit F and the marked information in Exhibit C under section 552.022. Finally, the county may withhold the remaining information under section 552.103 unless all other parties to the anticipated litigation have previously had access to it. As our ruling on these issues is dispositive, we need not address TXDOT's remaining argument against disclosure.

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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 county or county attorney. *Id.* § 552.3215(e).

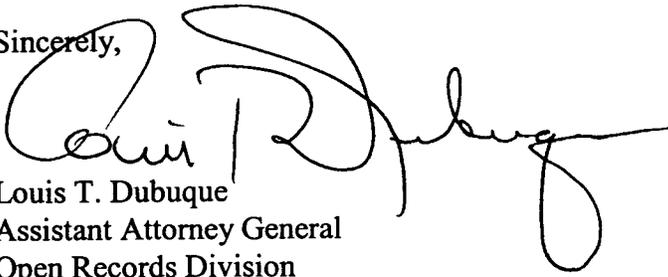
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Tex. Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



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Assistant Attorney General
Open Records Division

LTD/seg

Ref: ID# 226726

Enc. Submitted documents

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