



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 12, 2005

Mr. Gita P. Bolt
Interim General Counsel
Texas Southern University
3100 Cleburne Street
Houston, Texas 77004

OR2005-11126

Dear Mr. Bolt:

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# 237848.

Texas Southern University (the "university") received a request for information related to the university's new science building construction project. You claim that the 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.²

Initially, we note that some of the submitted information is subject to section 552.022 of the Government Code, which provides, in pertinent part:

¹Although you raise section 552.101 of the Government Code, we note that this section does not encompass other exceptions listed in the Act.

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.

[T]he 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[.]

Gov't Code § 552.022(a)(3). The submitted information contains a contract and change order relating to the expenditure of public funds. This information is subject to section 552.022(a)(3). Accordingly, this contract and change order must be released unless they are expressly made confidential under other law.

You argue that the contract and change order are excepted from disclosure under section 552.103 of the Government Code. Section 552.103 is a discretionary exception to disclosure that protects a 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 section 552.103); Open Records Decision No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 522 (1989) (discretionary exceptions in general). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the university may not withhold the information subject to section 552.022, which we have marked, under section 552.103 of the Government Code, and it must be released to the requestor as it is not otherwise confidential by law.

We will address your arguments under section 552.103 of the Government Code for the remaining information. 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(a), (c). The university 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 received the request, and (2) the information at issue is related to that litigation. *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 university must meet both prongs of this test for information to be excepted under 552.103(a).

You have submitted a copy of the Plaintiff's Original Petition in Cause No. 2005-56364, *J&C Plumbing & Mechanical, Inc. v. Lyda Swinerton Builders, Inc.*, which indicates that a lawsuit alleging breach of contract was filed against the university in the 152nd District Court, Harris County, Texas, on August 30, 2005. Based on our review of the submitted petition, we find that litigation was pending on the date the university received the request for information. We note that the requestor in this instance is representing the plaintiff in the pending litigation. You indicate that the plaintiff was a sub-contractor on the new science building construction project, and that the pending litigation is based on the contract for that construction project. Based on your representations and our review, we find that the remaining information is related to this pending litigation.

Generally, however, once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103 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, and it must be disclosed. In this instance, the plaintiff has had access to some of the submitted information. Therefore, this information may not be withheld under section 552.103, and must be released to the requestor. You may withhold the remaining information under section 552.103 to the extent it has not been provided to the opposing party in the pending litigation. We also note that the applicability of section 552.103 ends once the litigation has been concluded.

In summary, the university must release the contract and change order subject to section 552.022(a)(3) of the Government Code. The university must also release information that the plaintiff in the pending litigation has had access to. The remaining information may be withheld under 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 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 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 Office of the Attorney General 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. 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,

A handwritten signature in black ink, appearing to read 'JAP', with a large, stylized flourish extending to the right.

James A. Person III
Assistant Attorney General
Open Records Division

JAP/sdk

Ref: ID# 237848

Enc. Submitted documents

c: Mr. Allan G. Levine
Christian, Smith & Jewell
2302 Fannin, Suite 500
Houston, Texas 77002
(w/o enclosures)