



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 15, 2005

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

OR2005-11282

Dear Mr. Askins:

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# 238071.

The City of La Porte (the "city"), which you represent, received a request for seventeen categories of information related to condemnation proceedings, building permits and plans, zoning, a specified drainage project, and a specified tract of property. You state that you could not locate information responsive to a portion of category 12 of the request.¹ You claim that the remaining 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.²

¹We note that the Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

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.

Initially, we note that you have not submitted any information responsive to categories 11 and 14 of the request. You state that the “zoning variance” documents responsive to category 11 are “not allowable.” You also state the city has “no way of tracking” the building plans responsive to category 14 and that “[b]uilding plans sealed by engineer or architect are not subject to release without prior written permission.” As we noted earlier, the Act 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 for information. *See Bustamante*, 562 S.W.2d 266; Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983). However, a governmental body must make a good faith effort to relate a request for information to any responsive information that is within its custody or control. *See* Open Records Decision No. 561 at 8-9 (1990). Additionally, we note that a governmental body may not refuse to comply with a request on the ground of administrative inconvenience. *See Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 687 (Tex. 1976). Based on our review of your representations, we are uncertain as to whether the city collects, assembles, maintains, owns, or has a right of access to any information that is responsive to categories 11 and 14. *See* Gov’t Code § 552.002 (defining “public information”). Therefore, to the extent that the city collects, assembles, maintains, owns, or has a right of access to information responsive to categories 11 and 14, we conclude that such information is subject to disclosure under the Act. In that event, because you have not submitted any such information to this office for review, we conclude it must be released to the requestor. *See* Gov’t Code §§ 552.301, 552.302. To the extent that information responsive to categories 11 and 14 is not collected, assembled, or maintained for the city or the city does not own or have a right of access to such information, we conclude that such information is not subject to disclosure under the Act and need not be released to the requestor.

Next, we note that the submitted information includes the minutes of a city council meeting. The minutes of a governmental body’s public meetings are specifically made public by statute. *See* Gov’t Code §§ 551.022 (minutes and tape recordings), 551.043 (notice). Information made public by statute may not be withheld from the public under any of the Act’s exceptions to public disclosure. *See, e.g.*, Open Records Decision Nos. 544 (1990), 378 (1983), 161 (1977), 146 (1976). Accordingly, the submitted city council minutes must be released in accordance with the Open Meetings Act.

We further note that the submitted information includes ordinances and a resolution adopted by the city council. Because laws and ordinances are binding on members of the public, they are matters of public record and may not be withheld from disclosure under the Act. *See* 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”); *see also* Open Records Decision No. 551 at 2-3 (1990) (laws or ordinances are open records). We believe the submitted city council resolution is analogous to an ordinance. Accordingly, the city must release the submitted ordinances and resolution and any document attached or incorporated by reference into those documents.

We now address your section 552.103 claim against disclosure for the remaining information. Section 552.103 provides in relevant part 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 city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in this particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated on the date that the request for information is received, 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 city must meet both prongs of this test for information to be excepted under 552.103(a).

The city states, and provides documentation showing, that, prior to the receipt of the instant request, the city filed a condemnation lawsuit to acquire certain real property for drainage purposes. The city contends that the remaining information “directly relate[s] to the contested legal issues identified in the suit.” After reviewing the city's arguments and the documents at issue, we agree that litigation was pending on the date the city received the request for information. We further find that the remaining information relates to the pending litigation.

We note, however, that some of the documents at issue reflect on their face that they were obtained from or provided to an opposing party in the pending litigation. Once information has been obtained by all parties to a 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, to the extent that the remaining information has either been obtained from or provided to any of the opposing parties or their representatives, it is not excepted from disclosure under section 552.103(a) and may not be withheld on that basis. However, to the extent that the remaining information has not been obtained from or provided to any of the opposing parties or their representatives, it may be withheld from disclosure under section 552.103(a). Furthermore, the applicability of section 552.103(a)

ends once litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, to the extent that the city collects, assembles, maintains, owns, or has a right of access to information responsive to categories 11 and 14 of the request, such information must be released to the requestor. To the extent that information responsive to categories 11 and 14 of the request is not being collected, assembled, or maintained for the city or the city does not own or have a right of access to such information, we conclude that such information is not subject to disclosure under the Act and need not be released to the requestor. The submitted city council minutes must be released in accordance with the Open Meetings Act. The city must release the submitted city council ordinances and resolution and any document attached or incorporated by reference into those documents. To the extent that the remaining information has not been obtained from or provided to any of the opposing parties or their representatives, it may be withheld from disclosure 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,



Caroline E. Cho
Assistant Attorney General
Open Records Division

CEC/sdk

Ref: ID# 238071

Enc. Submitted documents

c: Mr. P. Randall Crump
Shook, Hardy & Bacon, L.L.P.
JPMorgan Chase Tower
600 Travis Street, Suite 1600
Houston, Texas 77002-2911
(w/o enclosures)