



ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

July 14, 2006

Mr. Arturo D. Rodriguez, Jr.
Russell, Moorman & Rodriguez, L.L.P.
Attorneys at Law
102 West Morrow Street, Suite 103
Georgetown, Texas 78626

OR2006-07564

Dear Mr. Rodriguez:

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# 252949.

The City of Meridian (the "city"), which you represent, received a request for five categories of documents pertaining to two specific applications for certificates of convenience and necessity from the Texas Commission on Environmental Quality. You inform us that the city does not maintain an itemized list of city expenses regarding the project.¹ You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that you did not submit any arguments in support of your claim under section 552.107. Thus, the city has waived its claim under section 552.107. *See Gov't Code 552.301(e)*(governmental body must provide arguments explaining why exceptions

¹The Act does not require a governmental body to disclose information that did not exist at the time the request was received, nor does it require a governmental body to prepare new information in response to a request. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Attorney General Opinion H-90 (1973); Open Records Decision Nos. 452 at 2-3 (1986), 342 at 3 (1982), 87 (1975); *see also* Open Records Decision Nos. 572 at 1 (1990), 555 at 1-2 (1990), 416 at 5 (1984).

raised should apply to information requested); *see also* Open Records Decision Nos. 676 at 12 (2002) (harm to governmental body's interests under section 552.107 not compelling reason for non-disclosure), 522 at 4 (1989) (discretionary exceptions in general).

Next, we note that you have not submitted for our review any minutes from council meetings discussing the applications for certificates of convenience and necessity or the council vote to pursue the applications. As you have not submitted the council minutes or vote for our review, we assume you have released this information to the extent that it existed at the time this request was received. *See* Gov't Code §§ 552.301(a), .302.; Open Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible under circumstances); *see also* Gov't Code § 551.022 (providing that council minutes shall be available for public inspection upon request). Additionally, you have submitted only one email for our review in response to the request for "[a]ny and all correspondence with consultants." To the extent that the city maintains additional information responsive to the request for all correspondence with consultants, that information must also be released. If you have not released any such records, you must release them at this time.²

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

(a) Without limiting the amount or kind of information that is public information under this chapter, 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 contains a completed report. Under section 552.022, this information must be released unless it is expressly confidential under other law. Section 552.103 of the Government Code is a discretionary exception under the Act and does not constitute "other law" for purposes of section 552.022. *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); *see also* Open Records Decision

²In communications with this office, you informed us, and provided documentation showing, that a portion of the responsive information that you originally attempted to submit to this office in compliance with section 552.301(e)(1)(D) of the Government Code had been lost in the mail. Because of this, we delayed issuing a decision in order to allow the city time to resubmit the lost documents, and contacted your office concerning these documents. *See* Gov't Code § 552.306 (attorney general may extend the time for issuing a decision by ten working days). As of this date, the city has submitted no additional documents.

No. 522 (1989) (discretionary exceptions in general). Thus, the completed report, which we have marked, may not be withheld under section 552.103; instead, it must be released.

Turning to the remaining information, section 552.103 of the Government Code 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 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 city received the request for information, 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). A governmental body must meet both prongs of this test for information to be excepted under 552.103(a).

For purposes of section 552.103(a), this office considers a contested case under the Texas Administrative Procedure Act (the "APA"), chapter 2001 of the Government Code, to constitute "litigation." See Open Records Decision No. 588 (1991). You state, and provide documentation showing, that a public hearing on the applications for certificates of convenience and necessity was requested, and that a contested case hearing was scheduled prior to the date of the city's receipt of the request for information at issue. You further state that the proceedings are governed by the APA. Based on your representations and our review, we determine that litigation in this matter, in the form of a contested case under the APA, was pending prior to the date the city received the present request. We further find that the information at issue relates to the pending litigation for purposes of section 552.103(a). Thus, we find that you have demonstrated the applicability of section 552.103. Therefore, the city may withhold the remaining submitted information pursuant to section 552.103 of the Government Code.

We note, however, that once information has been obtained by all parties to the pending litigation, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 at 2 (1982). We also note that the applicability of section 552.103(a) ends when the litigation has concluded. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

In summary, the completed report subject to section 552.022, which we have marked, 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 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).

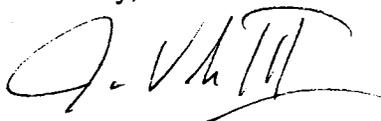
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



José Vela III
Assistant Attorney General
Open Records Division

JV/krl

Ref: ID# 252949

Enc. Submitted documents

c: Mr. Jeffrey Martin Hewlett
10370 Highway 6
Meridian, Texas 76665
(w/o enclosures)