



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 16, 2008

Mr. Leonard V. Schneider
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Attorneys at Law
2 Riverway, Suite 700
Houston, Texas 77056-1918

OR2008-08225

Dear Mr. Schneider:

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# 312904.

The City of Seabrook (the "city"), which you represent, received a request for information regarding poor maintenance, mold and mildew, failure to pay utilities, and tenant complaints pertaining to a specified apartment complex. You claim that the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, 552.130, and 552.136 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that the city has previously released some of the information that you now seek to withhold. The city has previously made the submitted notices of condemnation publicly available. The Act does not permit the selective disclosure of information to the public. *See* Gov't Code §§ 552.007(b), .021; Open Records Decision No. 463 at 1-2 (1987). If information has been voluntarily released to any member of the public, then that same information may not subsequently be withheld from the public, unless its public disclosure is expressly prohibited by law. *See* Gov't Code § 552.007(a); Open Records Decision Nos. 518 at 3 (1989), 490 at 2 (1988). You claim that the notices are excepted from disclosure under section 552.103 of the Government Code. However, section 552.103 does not prohibit public disclosure of information. *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). Thus, the city may not now withhold the notices,

which we have marked for release, under section 552.103 of the Government Code. As you raise no other exception to disclosure of the notices, they must be released to the requestor.

Next, we note that some of the remaining information is subject to section 552.022 of the Government Code. Section 552.022(a) provides in part 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;

...

(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)(1), (3). The information you submitted to this office includes completed reports or investigations and information in an account relating to the receipt of funds. The information subject to section 552.022, which we have marked, must be released, unless it is expressly confidential under other law or unless the information encompassed by section 552.022(a)(1) is excepted from disclosure under section 552.108 of the Government Code. You claim that the submitted information is subject to section 552.103 of the Government Code. We note, however, that this section is a discretionary exception to public disclosure that protects 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 section 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 does not qualify as other law that makes information confidential for the purposes of section 552.022. Therefore, the city may not withhold any portion of the information subject to section 552.022 of the Government Code under section 552.103 of the Government Code.

We note that the information subject to section 552.022 contains an account number. Section 552.136 of the Government Code is other law for purposes of section 552.022.¹ Section 552.136 states that “[n]otwithstanding any other provision of this chapter, a credit

¹The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. Accordingly, the city must withhold the meter account number we have marked pursuant to section 552.136 of the Government Code.

We now address your argument under section 552.103 of the Government Code 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.

Id. § 552.103(a), (c). A governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. 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.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See* Open Records Decision No. 551 at 4 (1990).

You contend that the submitted information is related to a pending lawsuit to which the city is a party. You inform us, and have provided documentation demonstrating, that litigation is pending in the U.S. Bankruptcy Court for the Eastern District of Louisiana, Case No. 07-12151, *In Re: M.B.S. Management Services, Inc., et al.*. You state that the city is a party to the litigation as a creditor. You state that the remaining information is related to the pending lawsuit. Based on your representations, the submitted documentation, and our review of the information at issue, we find that litigation was pending when the city received this request for information and that the information at issue is related to the pending

litigation for the purposes of section 552.103. Therefore, the city may withhold the remaining information under section 552.103 of the Government Code.²

In reaching this conclusion, we assume that the opposing parties in the litigation have not seen or had access to the remaining information. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that is related to litigation through discovery procedures. *See* ORD 551 at 4-5. If the opposing parties have seen or had access to information that is related to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We note that the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the city must release the notices we have marked. The city must release the information we have marked under section 552.022(a) of the Government Code. The city must withhold the account number we have under section 552.136 of the Government Code. 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, 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,

²As our ruling is dispositive, we need not address your remaining arguments against disclosure.

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 challenge 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,



Benjamin A. Diener
Assistant Attorney General
Open Records Division

BAD/mcf

Ref: ID# 312904

Enc. Submitted documents

c: Mr. King Israel
2401 Repsdorff Road, # 320
Seabrook, Texas 77586
(w/o enclosures)