



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 1, 2008

Mr. James G. Nolan
Open Records Attorney
Texas Comptroller of Public Accounts
P.O. Box 13528
Austin, Texas 78711-3528

OR2008-13475

Dear Mr. Nolan:

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# 323234.

The Texas Comptroller of Public Accounts (the "comptroller") received a request for "any letters, e-mails, memoranda or other documents generated since 2004 dealing with matters involving the allocation of sales tax revenues to the City of Grand Prairie for sales made by The RoomStore and Ashley Furniture." You state that you will release a portion of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.116, and 552.137 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative samples of information.¹

You assert that a portion of the submitted information is excepted under section 552.103 of the Government Code, which provides in part as follows:

¹We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decisions 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.

(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. 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 governmental body 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). The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state that the marked information is related to litigation that is currently pending in the 261st Judicial District Court of Travis County styled *City of Webster and the Webster Economic Development Corp. v. Carole Keeton Strayhorn, in her official capacity as Comptroller of Public Accounts for the State of Texas*, No. D-1-GV-06-001823. You also assert that the pending litigation pertains to the same tax allocations and reallocations at issue in the marked information. Based upon your representations and our review of the documents, we conclude that section 552.103 of the Government Code is applicable to the information you have marked and that you may withhold this information under section 552.103.² *But see* Gov't Code § 552.022(a)(1) (completed audit is public information and not excepted from public disclosure unless expressly confidential under other law).

We note, however, that 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, if any of the information you seek to withhold under 552.103 has been provided to all opposing parties to the litigation, then that information must be released. Further, the applicability of

²Because our determination on this issue is dispositive, we need not address your remaining arguments against disclosure of this information.

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).

Next, we address your arguments under section 552.116 for the information that you state has been released to the opposing parties in the pending litigation.³ Section 552.116 provides as follows:

(a) An audit working paper of an audit of the state auditor or the auditor of a state agency, an institution of higher education as defined by Section 61.003, Education Code, a county, a municipality, a school district, or a joint board operating under Section 22.074, Transportation Code, including any audit relating to the criminal history background check of a public school employee, is excepted from the requirements of Section 552.021. If information in an audit working paper is also maintained in another record, that other record is not excepted from the requirements of Section 552.021 by this section.

(b) In this section:

(1) 'Audit' means an audit authorized or required by a statute of this state or the United States, the charter or an ordinance of a municipality, an order of the commissioners court of a county, a resolution or other action of a board of trustees of a school district, including an audit by the district relating to the criminal history background check of a public school employee, or a resolution or other action of a joint board described by Subsection (a) and includes an investigation.

(2) 'Audit working paper' includes all information, documentary or otherwise, prepared or maintained in conducting an audit or preparing an audit report, including:

(A) intra-agency and interagency communications; and

(B) drafts of the audit report or portions of those drafts.

³We note that although section 552.007 of the Government Code generally prohibits selective disclosure of information that a governmental body has voluntarily made available to any member of the public, release of information among litigants in the course of discovery does not constitute a "voluntary" release of information for purposes of the Act. See *Cornyn v. City of Garland*, 994 S.W.2d 258, 265 (Tex. App.—Austin 1999, no pet.) (disclosure of information pursuant to discovery does not constitute voluntary disclosure for purposes of section 552.007); Open Records Decision No. 579 (1990) (exchange of information among litigants in "informal" discovery is not "voluntary" release of information for purposes of statutory predecessor of section 552.007).

Gov't Code § 552.116. You state that the information you have marked was prepared and is maintained by the comptroller as part of the working papers of audits conducted by the comptroller. You further explain that the audits are authorized by section 111.004 of the Tax Code. *See* Tax Code § 111.004 (regarding comptroller's authority to examine records and persons for purpose of carrying out state taxation). Based on your representation and our review, we agree that section 552.116 of the Government Code is applicable to the remaining information you have marked. We therefore conclude the comptroller may withhold this information pursuant to section 552.116 of the Government Code.

Finally, the comptroller asserts that some of the remaining information is excepted under section 552.137 of the Government Code. Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body" unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov't Code § 552.137(a)-(c). The e-mail address at issue does not appear to be of a type specifically excluded by section 552.137(c), and you state that the individual to whom the e-mail address pertains has not affirmatively consented to its release. Therefore, unless the comptroller receives consent to release it, the e-mail address you have marked must be withheld under section 552.137.

In summary, you may withhold the information you have marked under section 552.103 of the Government Code. You may withhold the information you have marked under section 552.116. You must withhold the e-mail address you have marked under section 552.137. The remaining information must be released.

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

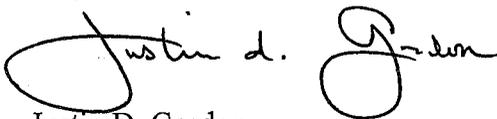
will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, then the requestor should report that failure to the attorney general's Open Government Hotline, 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,



Justin D. Gordon
Assistant Attorney General
Open Records Division

JDG/ma

Ref: ID# 323234

Enc. Submitted documents

c: Mr. Rick Casey
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(w/o enclosures)