



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

November 7, 2008

Ms. Maria Smith
North Texas Tollway Authority
P.O. Box 260729
Plano, Texas 75026

OR2008-15378

Dear Ms. Smith:

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#327274.

The North Texas Tollway Authority (the "authority") received a request for all information concerning billboards owned by the Faulkner Investment Company, Ltd. ("Faulkner") located at the intersection of SH 190 and I-30 in Garland, Texas. You state you have released some of the requested information to the requestor. You claim that the remaining information is excepted from disclosure under sections 552.103, 552.105, 552.107, 552.110, and 552.111 of the Government Code. Additionally, you indicate that the request may implicate the proprietary interests of a third party. Pursuant to section 552.305(d) of the Government Code, you have notified Faulkner of the request and of their opportunity to submit comments to this office as to why this information should not be released. *See Gov't Code § 552.305(d)*; Open Records Decision No. 542 (statutory predecessor to section 552.305 allows a governmental body to rely on an interested third party to raise and explain the applicability of the exception to disclosure in certain circumstances). You also indicate that the request may implicate the interests of the Texas Department of Transportation and the City of Garland (the "city"), and you have notified them of their right to submit arguments to this office as to why the requested information should not be released. *See Gov't Code § 552.304* (interested party may submit comments stating why information should or should not be released). The city and Faulkner have submitted comments to our office. We have considered the submitted arguments and reviewed the submitted representative sample of information.¹

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 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

Initially, we note that some of the submitted information, which we have marked, is not responsive to the instant request for information because it was created after the request was received. In addition, you have marked information that is not responsive. This ruling does not address the public availability of any information that is not responsive to the request and the authority is not required to release that information in response to the request.

Next, we note that the submitted documents include an agenda of a city council meeting. The agendas of a governmental body's public meetings are specifically made public under the Open Meetings Act, chapter 551 of the Government Code. *See* Gov't Code §§ 551.041 (governmental body shall give written notice of date, hour, place, and subject of each meeting), 551.043 (notice of meeting of governmental body must be posted in place readily accessible to general public for at least 72 hours before scheduled time of meeting). As a general rule, the exceptions to disclosure found in the Act do not apply to information that is made public by other statutes. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Thus, the authority may not withhold the agenda, which we have marked, under section 552.107 of the Government Code and must release this information to the requestor.

We now address your claim under section 552.103 of the Government Code for the remaining responsive information. Section 552.103 provides in relevant part:

(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). A governmental body that claims an exception to disclosure under section 552.103 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). Both prongs of this test must be met in order for information to be excepted under section 552.103(a). See ORD 551 at 4.

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. See Open Records Decision No. 452 at 4 (1986). When the governmental body is the prospective plaintiff in litigation, the evidence of anticipated litigation must at least reflect that litigation involving a specific matter is “realistically contemplated.” See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (investigatory file may be withheld if governmental body’s attorney determines that it should be withheld pursuant to section 552.103 and that litigation is “reasonably likely to result”).

In this instance, you claim that the authority reasonably anticipates litigation relating to the subject of the present request. You state that if the authority fails to consummate the purchase of the Faulkner properties at issue, the authority will institute condemnation proceedings. You also state, and provide supporting documentation, that the authority’s attorneys had already created a conflict analysis in anticipation of potential condemnation proceedings. Further, the authority had prepared a condemnation package pertaining to the properties at issue. Based on your representations and our review, we conclude that the authority reasonably anticipated litigation when it received this request for information. We also find that the submitted information relates to the anticipated litigation. Therefore, we conclude that section 552.103 is generally applicable to the remaining information.

We note, however, that some of the information at issue was provided to or obtained from the opposing party in the anticipated litigation. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information relating to litigation through discovery procedures. See ORD 551 at 4-5. If the opposing party has seen or had access to information relating 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). Therefore, the information that has been provided to or obtained from the opposing party in the anticipated litigation, which we have marked, is not excepted from disclosure under section 552.103(a). Furthermore, the applicability of section 552.103(a) ends when the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

With respect to the information that may not be withheld under section 552.103, we will address your argument under section 552.105 of the Government Code, which excepts from disclosure information that relates to:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or

- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Gov't Code § 552.105. Section 552.105 is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. *See* Open Records Decision Nos. 564 (1990), 357 (1982), 310 (1982). Information that is excepted from disclosure under section 552.105 that pertains to such negotiations may be excepted from disclosure so long as the transaction relating to that information is not complete. *See* ORD 310. But the protection offered by section 552.105 is not limited solely to transactions not yet finalized. This office has concluded that information about specific parcels of land obtained in advance of other parcels to be acquired for the same project could be withheld where release of the information would harm the governmental body's negotiating position with respect to the remaining parcels. *See* ORD 564 at 2. A governmental body may withhold information "which, if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" ORD 357 at 3 (quoting Open Records Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiating position with regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body's good-faith determination in this regard, unless the contrary is clearly shown as a matter of law. *See* ORD 564.

You state that the submitted information pertains to the purchase price of real property that is currently the subject of negotiations between the authority and Faulkner. You indicate that the authority has made a good-faith determination that release of this information would harm the authority's negotiating position when purchasing the property at issue. Based on your representations and our review, we conclude that the authority may withhold the information we have marked under section 552.105 of the Government Code.²

In summary, with the exception of the marked agenda and information provided to or obtained from the opposing party, the authority may withhold the submitted information under section 552.103. The authority may withhold the information provided to or obtained from the opposing party, which we have marked, under section 552.105 of the Government Code. 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

²As our ruling is dispositive, we need not address your remaining arguments against disclosure or the arguments submitted by the city or Faulkner.

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). If the governmental body does not file suit over 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,



Christina Alvarado
Assistant Attorney General
Open Records Division

CA/ma

Ref: ID#327274

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