



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 15, 2009

Mr. Robert E. Hager
Nichols, Jackson, Dillard, Hager & Smith, LLP
1800 Lincoln Plaza
500 North Akard
Dallas, Texas 75201

OR2009-00667

Dear Mr. Hager:

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# 332311.

The City of Coppell (the "city"), which you represent, received three requests for all contracts between the city and Steve Nichols Appraisal Services, Inc. over a particular time period, engineering drawings pertaining to Resolution No. 2008-0311-1, and permit applications and plan reviews pertaining to a specified area of land. You claim that the 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 information. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

Initially, we note that the requestor seeks all contracts between the city and Steve Nichols Appraisal Services, Inc. over a particular time period. As you have not submitted any information responsive to this portion of the request, we assume you have released any additional responsive information. If you have not released any such records, you must do so at this time. *See* Gov't Code §§ 552.301(a), .302; *see also* Open Records Decision No. 664 (2000) (if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible).

Next, we note you have redacted portions of the submitted information. Pursuant to section 552.301 of the Government Code, a governmental body that seeks to withhold requested information must submit to this office a copy of the information, labeled to indicate which exceptions apply to which parts of the copy, unless the governmental body has received a previous determination for the information at issue. Gov't Code § 552.301(a), (e)(1)(D). You do not assert, nor does our review of the records indicate, you have been authorized to withhold any of the redacted information without seeking a ruling from this office. *See id.* § 552.301(a); Open Records Decision 673 (2000). As such, the information must be submitted in a manner that enables this office to determine whether the information comes within the scope of an exception to disclosure. In this instance, we can discern the nature of the redacted information; thus, being deprived of that information does not inhibit our ability to make a ruling. In the future, however, the city should refrain from redacting any information it submits to this office in seeking an open records ruling.

The submitted information includes an ordinance and a resolution adopted by the city. 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. 551 at 2-3 (1990) (laws or ordinances are open records). Therefore, the ordinance that we have marked must be released. The resolution that we have marked is analogous to an ordinance and as such must also be released.

The submitted information also includes a notice of a public hearing of the city council and the city zoning and planning commission. Notices of a governmental body's public meetings are specifically made public under provisions of 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 other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the city must also release the notice of a public hearing that we have marked pursuant to section 551.041 of the Government Code.

We also note that section 552.022 of the Government Code is applicable to some of the remaining information. Section 552.022(a) provides for required public disclosure of the following types of information unless the information is 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). We have marked the information that is subject to section 552.022. The city must also release that information unless it is expressly confidential under other law. Section 552.103 of the Government Code, which you raise, is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See id.* § 552.007; *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); Open Records Decision No. 665 at 2 n.5 (discretionary exceptions generally). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the city may not withhold any of the information that is subject to section 552.022 under section 552.103. We note that some of the information subject to section 552.022 is also subject to section 552.136 of the Government Code.¹ As section 552.136 is "other law" for the purposes of section 552.022, we will address the applicability of this exception to the information marked under section 552.022.

Section 552.136 of the Government Code states that "[n]otwithstanding any other provision of this chapter, a credit 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, we find that the city must withhold the bank account and routing numbers we have marked in the information subject to section 552.022 under section 552.136 of the Government Code.

We now address the city's claim under section 552.103 of the Governmental Code for the remaining information. Section 552.103 provides in 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

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).

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 governmental body received the request, 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 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). In the context of anticipated litigation in which the governmental body is the prospective prosecutor or plaintiff, the concrete evidence must at least reflect that litigation is "realistically contemplated." See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (finding that investigatory file may be withheld if governmental body attorney determines that it should be withheld pursuant to section 552.103 and that litigation is "reasonably likely to result"). Whether litigation is reasonably anticipated must be determined on a case-by-case basis.

In this instance, you inform us that the city reasonably anticipates pursuing condemnation proceedings against the owner of a specified property. In support, you state, and provide documentation showing, that prior to the city's receipt of this request for information, the city council passed Resolution 2008-0311.1, which authorized the city attorney to file a condemnation proceeding against the property owner. You also assert that the submitted information pertains to the property at issue or to adjacent property. Based upon these representations and our review, we conclude that the city reasonably anticipated litigation on the date it received the request for information. We also find that the remaining submitted information relates to the anticipated litigation. Therefore, we conclude that section 552.103 of the Government Code is applicable to the remaining submitted information. Accordingly, with the exception of the marked ordinance, resolution, notice of a public hearing, and information subject to section 552.022, the city may withhold the remaining submitted information under section 552.103.

However, 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). Some of the submitted documents reflect on their faces that they were obtained from or provided to the opposing party in the anticipated litigation. These documents may not be withheld under section 552.103. Further,

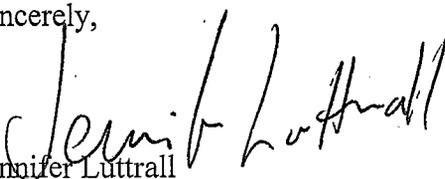
the applicability of section 552.103(a) ends once the litigation has been concluded or is no longer realistically anticipated. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the ordinance, resolution, and notice of a public hearing we have marked must be released. In the information subject to section 552.022 of the Government Code, the city must withhold the bank account and routing numbers we have marked under section 552.136 of the Government Code. The remaining information subject to section 552.022, which we have marked, must be released. The city may withhold the remaining information under section 552.103 of the Government Code.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,



Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/eeg

Ref: ID# 332311

Enc. Submitted documents

c: Requestor
(w/o enclosures)