



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 23, 2008

Ms. Rebecca Brewer
Abernathy, Roeder, Boyd & Joplin, P.C.
P.O. Box 1210
McKinney, Texas 75070-1210

OR2009-05386

Dear Ms. Brewer:

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# 340675 (Frisco Request No. 2009-0200).

The City of Frisco (the "city"), which you represent, received a request for information created over a specified period of years, including (1) wastewater master plans, (2) capital improvement plans, and (3) comprehensive land use plans. You claim that the submitted 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.

Initially, we note the submitted information contains e-mails that were created after the date of the request. Those e-mails, which we have marked, are not responsive to the instant request. The city need not release nonresponsive information in response to this request and this ruling will not address that information.

Next, we note that most of the submitted information is subject to section 552.022 of the Government Code, which provides in part:

- (a) 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;

...

(5) all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate[.]

Gov't Code § 552.022(a)(1), (3), (5). You have submitted completed reports, account information, and budgetary materials that are subject to sections 552.022(a)(1), 552.022(a)(3), and 552.022(a)(5). You claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code. However, this section 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); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Accordingly, the city may not withhold the information subject to section 552.022 under section 552.103 of the Government Code. As you raise no other exceptions to the disclosure of this information, it must be released.

We will now address the applicability of section 552.103 to the information not subject to section 552.022. 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

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 has the burden of providing relevant facts and documents to show the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing (1) litigation was 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state the city received the request for information after the initiation of three lawsuits, styled *City of The Colony, Texas vs. North Texas Municipal Water District and the City of Frisco, Texas*, Cause No. 2004-40164-362, in the 362nd Judicial District Court, Denton County, Texas; *City of The Colony, Texas, and the City of Frisco, Texas, and North Texas Municipal Water District vs. North Texas Municipal Water District and the City of Frisco, Texas, and the City of The Colony, Texas*, Cause No. 02-07-00128-CV, in the Court of Appeals, Second District of Texas, and; *City of The Colony, Texas vs. North Texas Municipal Water District and the City of Frisco, Texas*, in the Supreme Court of the State of Texas. Based upon your representations and our review, we conclude litigation involving the city was pending when the city received the request. You further state that the city intends to pursue a claim for funds owed to the city under the contract at issue in the pending litigation. You assert the remaining information is related to the litigation. However, you have not submitted copies of any relevant pleadings, nor have you otherwise sufficiently explained how or why any of the remaining information is related to the pending litigation. See Gov't Code § 552.301(e)(1) (requiring governmental body to explain applicability of raised exception); see also Open Records Decision Nos. 551 at 5 (1990) (attorney general will determine whether governmental body has reasonably established that information at issue is related to litigation), 511 at 2 (1988) (information "relates" to litigation under statutory predecessor if its release would impair governmental body's litigation interests). We therefore conclude that the city may not withhold any of the remaining information under section 552.103 of the Government Code.

We note that portions of the submitted information are protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are protected by copyright. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of materials protected by copyright, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright

law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the city need not release the marked nonresponsive information. The city must release the information subject to section 552.022 of the Government Code. As you raise no other exceptions to disclosure, the remaining responsive information must also be released, but any copyrighted information may only be released in accordance with copyright law.

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,



Matt Entsminger
Assistant Attorney General
Open Records Division

MRE/dls

Ref: ID# 340675

Enc. Submitted documents

c: Requestor
(w/o enclosures)