



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 12, 2010

Mr. Trey Jackson
Assistant City Attorney for the City of Troy
Bojorquez Law Firm, PLLC
12325 Hymeadow Drive, Suite 2-100
Austin, Texas 78750

OR2010-00588

Dear Mr. Jackson:

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# 366906.

The City of Troy (the "city"), which you represent, received a request for information pertaining to seven specified building applications and information pertaining to all projects commenced in the city within the last two years. You state that some of the responsive information will be made available to the requestor. 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.¹

Initially, we note that some of the submitted information is subject to required public disclosure under section 552.022 of the Government Code, which provides in relevant part:

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:

- ...
- (3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

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 office.

Gov't Code § 552.022(a)(3). Upon review, portions of the submitted information consists of information in an account or voucher relating to the receipt of funds by the city. We have marked the portions of the submitted information that are subject to section 552.022(a)(3) of the Government Code. The city may only withhold this information if it is "expressly confidential under other law." *See id.* Although you raise section 552.103 of the Government Code, this section is a discretionary exception to 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); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 (1999) (governmental body may waive section 552.103). 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 the information that is subject to section 552.022 under section 552.103. As you raise no further arguments against the disclosure of the information we have marked under section 552.022(a)(3), it must be released.

Next, we address your argument that the information not subject to section 552.022 is excepted from disclosure under section 552.103 of the Government Code. 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 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 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).

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 or prosecutor 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").

You state that the requestor is the attorney for an individual whom the city has determined is in violation of the city's building ordinance. You inform this office that the city is in the process of filing a complaint as part of a criminal prosecution of the requestor's client for violation of the ordinance. You have also submitted an affidavit from the city secretary representing that the requestor and his client attended a meeting with the city regarding possible prosecution for the building ordinance violations. The affidavit also represents that during this meeting, the requestor and his client repeatedly stated they intend to file a lawsuit against the city and the city's mayor and counsel members. You contend that the submitted information could be used as evidence by the requestor's client in the prosecution. Based on your representations and our review of the submitted documentation, we agree that the city reasonably anticipated litigation on the date it received the request. In addition, we find that the submitted information is related to the anticipated litigation for purposes of section 552.103(a). Thus, we conclude that the city may withhold the remaining information under section 552.103 of the Government Code.

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

In summary, the city must release the information we have marked pursuant to section 552.022(a)(3) of the Government Code. 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, toll free, at (888) 672-6787.

Sincerely,


Laura Ream Lemus
Assistant Attorney General
Open Records Division

LRL/jb

Ref: ID# 366906

Enc. Submitted documents

c: Requestor
(w/o enclosures)