



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

January 21, 2010

Ms. YuShan Chang  
Assistant City Attorney  
City of Houston  
P.O. Box 368  
Houston, TX 77001-0368

OR2010-01000

Dear Ms. Chang:

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# 367628.

The City of Houston (the "city") received two requests from the same requestor for information relating to bids and funding for improvement projects at William H. Hobby Airport and George Bush Intercontinental Airport. 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 representative sample of information.<sup>1</sup> We have also received comments from the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, we address the requestor's contention that the city failed to comply with the procedural requirements set forth in section 552.301 of the Government Code. Section 552.301 of the Government Code prescribes the procedures that a governmental body must follow in asking this office to decide whether requested information is excepted

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<sup>1</sup>We 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.

from public disclosure. Pursuant to section 552.301(b), a governmental body must ask for a decision from this office and state the exceptions that apply within ten *business days* of receiving the written request. *See id.* § 552.301(b) (emphasis added). Under section 552.301(e), a governmental body is required to submit to this office within fifteen *business days* of receiving the request (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, (3) a signed statement or sufficient evidence showing the date the governmental body received the written request, and (4) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. *Id.* § 552.301(e) (emphasis added). The city received the request on October 26, 2009, and informs us that it was closed for business on November 11, 2009. Thus, the ten-business-day-deadline was November 9, 2009, and the fifteen-business-day deadline was November 17, 2009. The city met both of these deadlines, thus we find that the city fully complied with section 552.301 of the Government Code in requesting this decision. Therefore, we will consider the city's argument against disclosure.

Next, we note the submitted information includes a grant agreement that is subject to section 552.022(a)(3) of the Government Code, which provides:

(a) [T]he 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[.]

Gov't Code § 552.022(a)(3). Accordingly, the city may withhold the submitted information only if it is "expressly confidential under other law." 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 which 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 grant agreement under section 552.103 of the Government Code. As you raise no other exceptions to disclosure for the grant agreement, the city must release it to the requestor.

You claim the remaining information is excepted from disclosure under section 552.103 of the Government Code, which provides:

(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, 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 inform us, and provide documentation showing that, prior to the city's receipt of the present requests for information, a lawsuit styled *Southern Electrical Services, Inc., as Assignee of the Morganti Group, Inc. and The Morganti Group, Inc. v. the City of Houston*, Cause No. 2005-35287 was filed and is currently pending in the 157th Judicial District Court of Harris County, Texas. We therefore agree that litigation was pending on the date the city received the request. We further find that the information at issue relates to the pending litigation. Accordingly, the city may generally withhold the remaining information pursuant to section 552.103.

However, once information has been obtained by all parties to pending litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all parties to pending litigation is not excepted from disclosure under section 552.103(a) and must be disclosed. We note that some of the remaining information has been seen by the opposing party to the pending litigation. Accordingly, while some of the remaining information may be withheld under section 552.103, any information that has previously been seen by the opposing party may not be withheld under this exception. Further, the applicability of section 552.103(a) ends

once the litigation has concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

In summary, with the exception of the grant agreement, the city may withhold the submitted information under section 552.103 to the extent it has not been seen by the opposing party to the anticipated litigation. The grant agreement and any information previously seen by the opposing party must be released.

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](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,



Kate Hartfield  
Assistant Attorney General  
Open Records Division

KH/dls

Ref: ID# 367628

Enc. Submitted documents

c: Requestor  
(w/o enclosures)