



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 7, 2010

Mr. Benjamin J. Howell
Winstead, P.C.
Attorneys for Austin Convention Enterprises, Inc.
401 Congress Avenue, Suite 2100
Austin, Texas 78701

OR2010-10006

Dear Mr. Howell:

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# 385876.

Austin Convention Enterprises, Inc. ("ACE"), which you represent, received a request for six categories of information pertaining to the Hilton Austin hotel.¹ You state the ACE has released or will release some of the requested information. You claim 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 some of the submitted information is subject to section 552.022 of the Government Code, which provides in pertinent part:

- (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are

¹You inform us that ACE sought and received clarification of a portion of the information requested. See Gov't Code § 552.222 (providing that if request for information is unclear, governmental body may ask requestor to clarify request); see also Open Records Decision No. 31 (1974) (when presented with broad requests for information rather than for specific records, governmental body may advise requestor of types of information available so that request may be properly narrowed).

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[.]

Gov't Code § 552.022(a)(1). Exhibits L and M consist of completed reports, which you state were "commissioned by ACE," and are, therefore, subject to section 552.022(a)(1). ACE may only withhold the information subject to subsection 552.022(a)(1) if it is excepted from disclosure under section 552.108 of the Government Code or is expressly made confidential under other law. You claim Exhibits L and M are excepted from disclosure under section 552.103 of the Government Code. However, section 552.103 is a discretionary exception that protects a governmental body's interests and is, therefore, not "other law" for purposes of section 552.022. *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 section 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, ACE may not withhold Exhibits L and M under section 552.103 of the Government Code. As you raise no other exceptions against their disclosure, Exhibits L and M must be released. However, we will address your claim under section 552.103 for the information not subject to section 552.022, which consists of Exhibit K.

You claim that Exhibit K is excepted under section 552.103 of the Government Code, which provides in relevant part as follows:

(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). The purpose of section 552.103 is to protect the litigation interests of governmental bodies that are parties to the litigation at issue. *See id.* § 552.103(a); Open Records Decision No. 638 at 2 (1996) (section 552.103 only protects the

litigation interests of the governmental body claiming the exception). 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).

You state, and provide documentation showing, that prior to ACE's receipt of this request, ACE was a party to four pending civil lawsuits. You further explain how Exhibit K relates to pending litigation. Accordingly, we find that litigation was pending when ACE received this request for information. We also find Exhibit K relates to the pending litigation. Therefore, section 552.103 is generally applicable to Exhibit K.

In this instance, however, the opposing parties in the litigation at issue may have seen or had access to the documents in Exhibit K. We note that 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. Consequently, if all ACE's opposing parties previously have seen or had access to any of the information in Exhibit K, 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, to the extent that all ACE's opposing parties in the pending litigation have previously seen or had access to the information in Exhibit K, any such information may not be withheld under section 552.103. With that exception, ACE may withhold the information in Exhibit K under section 552.103. We note that the applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

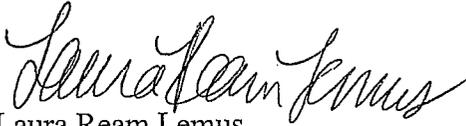
In summary, Exhibits L and M are subject to section 552.022(a)(1) of the Government Code and must be released. Except for the information that the opposing parties in the pending litigation have seen, ACE may withhold Exhibit K under section 552.103 of the Government Code.

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_ori.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# 385876

Enc. Submitted documents

c: Requestor
(w/o enclosures)