



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 22, 2010

Mr. Gary H. Shaver
Boon, Shaver, Echols & Coleman, P.L.L.C.
1800 Northwest Loop 281, Suite 310
Longview, Texas 75604

OR2010-16011

Dear Mr. Shaver:

This office issued Open Records Letter No. 2010-16011 (2010) on October 21, 2010. We have examined this ruling and determined that we made an error. Where this office determines that an error was made in the decision process under sections 552.301 and 552.306, and that error resulted in an incorrect decision, we will correct the previously issued ruling. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act"), chapter 552 of the Government Code). Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on October 21, 2010.

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# 397626.

The City of Carthage (the "city"), which you represent, received a request information pertaining to the Carthage Solid Waste Transfer Station. You indicate you do not have information responsive to a portion of the request.¹ You state you are releasing some information 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. We have also received and considered comments from the requestor. *See* Gov't Code § 552.304 (providing that

¹We note the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

interested party may submit comments stating why information should or should not be released).

As a preliminary matter, the requestor states the city has previously released some of the requested information pursuant to prior open records requests. Thus, we understand the requestor to argue that the city has waived its claim under section 552.103 by previously releasing the requested information to the public. *See* Open Records Decision No. 463 (1987) (governmental body can waive discretionary exceptions to disclosure by selective disclosure of information); *see also* Gov't Code § 552.007 (prohibiting selective disclosure of information). In this instance, we are unable to determine whether any portion of the submitted information has previously been released. Thus, we must rule conditionally. To the extent the city previously released the submitted information in response to prior open records requests, the city may not withhold that information under section 552.103 and must release it to the requestor. However, to the extent the submitted information has not previously been released pursuant to open records requests, we will consider the city's claim under section 552.103.

Next, the requestor argues that the requested information must be maintained at the Carthage Solid Waste Transfer Station (the "facility") and made available to interested parties pursuant to section 330.219 of title 30 the Texas Administrative Code. Based on the requestor's argument, we understand him to assert that he has a right of access to the requested information pursuant to section 330.219(a) of title 30 of the Texas Administrative Code, which provides:

(a) A copy of the permit or registration, the approved permit or registration application, and any other required plan or other related document shall be maintained at the municipal solid waste facility at all times during construction. After completion of construction, an as-built set of construction plans and specifications shall be maintained at the facility or at an alternative location approved by the executive director. These plans shall be made available for inspection by agency representatives or other interested parties. These documents shall be considered a part of the operating record for the facility.

30 T.A.C. § 330.219(a). Thus, section 330.219(a) requires the maintenance of certain information by a municipal solid waste facility and only requires that an as-built set of construction plans and specifications must be made available for inspection once construction has been completed. We note, and the requestor acknowledges, the construction was completed on the facility in 2002. Although section 330.219(a) requires an as-built set of construction plans and specifications to be maintained at the facility and made available for inspection, in this instance none of the submitted information consists of an as-built set of construction plans and specifications. Thus, section 330.219(a) is not applicable to any of the submitted information. Consequently, the city need not release any of the submitted information pursuant to this provision.

The city raises section 552.103 of the Government Code for the submitted information, which 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 is pending or reasonably anticipated on the date the governmental body receives the request for information, and (2) the information at issue is related to that litigation. *See Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *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 section 552.103(a). *See* ORD 551 at 4.

You state, and provide documentation showing, that prior to the city's receipt of the request, a lawsuit styled *Vickie Bailey v. Mckinney & Moore, L.P. (Formerly McKinney & Moore, Inc.)*, County of Panola, Texas and City of Carthage, Texas, Cause No. 2010-023, was filed and is currently pending in the 123rd Judicial District Court of Panola County, Texas. Therefore, we agree that litigation was pending on the date the city received the present request for information. Further, you state that the submitted information is related to the lawsuit pending before the court. Based on your representations and our review, we agree the information at issue relates to pending litigation for purposes of section 552.103. Accordingly, the city may withhold the information at issue under section 552.103 of the Government Code.

However, the requestor states, and you acknowledge, that the city has provided some of the requested information to the opposing party in the pending litigation pursuant to discovery. 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. Thus, if the opposing party has seen or had access to

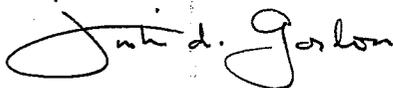
information relating to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Therefore, to the extent that the opposing party in the pending litigation has seen or had access to any portion of the submitted information, such information is not protected by section 552.103 and may not be withheld on that basis. We also note that the applicability of section 552.103 ends once the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, with the exception of the information that has been previously released, the city may withhold the submitted 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,



Justin D. Gordon
Assistant Attorney General
Open Records Division

JDG/em

Ref: ID# 397626

Enc. Submitted documents

cc: Requestor
(w/o enclosures)