



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

May 16, 2011

Mr. Jim D. McLeroy  
Counsel for City of Commerce  
McLeroy Law Firm  
P.O. Box 657  
Sulphur Springs, Texas 75482

OR2011-06739

Dear Mr. McLeroy:

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# 419976.

The City of Commerce (the "city"), which you represent, received a request for records and monthly statements for legal fees pertaining to a specified lawsuit. 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 representative sample of information.<sup>1</sup>

Initially, you state it appears the requestor is asking for the city to supply him with information responsive to his request throughout the pendency of the specified lawsuit. The Act does not require a governmental body to comply with a continuing request to supply information on a periodic basis as such information is prepared in the future. *See* Attorney General Opinion JM-48 at 2 (1983); *see also* Open Records Decision Nos. 476 at 1 (1987), 465 at 1 (1987). Instead, the Act applies only to information that a governmental body possesses or has access to at the time it is requested.

Next, we note portions of the submitted information are subject to section 552.022 of the Government Code. Section 552.022(a) provides in part that:

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<sup>1</sup>We assume 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.

(a) Without limiting the amount or kind of information that is public information under this chapter, 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; [and]

...

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege[.]

Gov't Code § 552.022(a)(3), (16). In this instance, a portion of the submitted records consists of information in a voucher and contract relating to the expenditure of public funds by the city and attorney fee bills. Thus, the city must release this information pursuant to subsections 552.022(a)(3) and 552.022(a)(16) unless it is expressly confidential under other law. You assert that this information is excepted under section 552.103 of the Government Code. However, section 552.103 is a discretionary exception to disclosure that protects a governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 69, 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). 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 at issue, which we have marked, under section 552.103 of the Government Code.

We will now consider your claim under section 552.103 of the Government Code for submitted the information that is not subject to section 552.022. Section 552.103 provides, in relevant 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 claiming section 552.103 has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information, and (2) the information at issue is related to that litigation. *See Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

You raise section 552.103 for the remaining information. You state, and provide documentation showing, prior to the city's receipt of the request for information, a lawsuit styled *The City of Commerce v. Quay Thogmorton and Paige Throgmorton*, Cause No. 76344, was filed and is currently pending in the 196<sup>th</sup> District Court of Hunt County, Texas. Therefore, we agree litigation was pending on the date the city received the request for information. You also contend the information at issue pertains to the substance of the lawsuit claims. Based on your representations and our review, we find the information at issue is related to the pending litigation. Therefore, we conclude section 552.103 of the Government Code is generally applicable to the remaining information.

We note, however, it appears the opposing parties in the pending litigation have seen or had access to some of the information at issue. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain such information through discovery procedures. *See ORD 551 at 4-5.* Thus, once the opposing party in pending litigation has seen or had access to information that is related to the litigation, there is no interest in withholding such information from public disclosure under section 552.103. *See Open Records Decision Nos. 349 (1982), 320 (1982).* Accordingly, the city may withhold the portions of the information at issue that the opposing parties to the litigation have not seen or had access to under section 552.103 of the Government Code. We note 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).*

We note the information the opposing parties have already seen contains e-mail addresses. Section 552.137 of the Government Code provides that "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act]," unless the owner of the e-mail address has affirmatively consented to its public disclosure or the e-mail

address falls within the scope of section 552.137(c).<sup>2</sup> Gov't Code § 552.137(a)-(c). We note this exception is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. The city must withhold the e-mail addresses we have marked under section 552.137, unless the owners of the e-mail addresses have affirmatively consented to disclosure.<sup>3</sup>

In summary, the city must release the marked information that is subject to section 552.022 of the Government Code. The city may withhold the information that is not subject to section 552.022 under section 552.103 of the Government Code, except for the information that the opposing parties in the litigation have already seen or to which they have had access. The city must withhold the marked e-mail addresses under section 552.137 of the Government Code, unless the owners have consented to disclosure. The rest of the submitted information 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,



Christina Alvarado  
Assistant Attorney General  
Open Records Division

CA/eb

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<sup>2</sup>The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

<sup>3</sup>We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including e-mail addresses of members of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

Ref: ID# 419976

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)