



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 3, 2011

Ms. Rebecca Brewer
For City of Frisco
Abernathy, Roeder, Boyd & Joplin, P.C.
P.O. Box 1210
McKinney, Texas 75070-1210

OR2011-11171

Dear Ms. Brewer:

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# 425817.

The City of Frisco (the "city"), which you represent, received a request for fire, health, hazmat incident reports, or inspection results related to Exide Technologies ("Exide") and a specified address. You claim the requested 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 portions of the submitted information are subject to section 552.022 of the Government Code, which states, in relevant part:

(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:

(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). The submitted information contains a Case Activity Report from the city's code enforcement department, incident reports from the city's fire department, and Fire Inspection Reports from the city fire marshal's office. Upon review, we find these documents, which we have marked, are completed reports. Pursuant to section 552.022(a)(1) of the Government Code, a completed report is expressly public unless it either is excepted under section 552.108 of the Government Code or is expressly confidential under other law. You claim the information at issue is excepted under section 552.103 of the Government Code. This section, however, is a discretionary exception to disclosure that protects a governmental body's interest and may be waived. *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 Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential). As such, it is not other law that makes information confidential for the purposes of section 552.022. Consequently, the city may not withhold the information subject to section 552.022(a)(1) under section 552.103 of the Government Code. As you raise no additional exceptions for this information, it must be released. However, we will consider your argument under section 552.103 for the information not subject to section 552.022.

Section 552.103 of the Government Code 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 that claims section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information at issue. To meet this burden, the governmental body must demonstrate that (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 the pending or anticipated 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).

To establish that litigation is reasonably anticipated for the purposes of section 552.103, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *See* Open Records Decision No. 452 at 4 (1986). In the context of anticipated litigation in which the governmental body is the prospective plaintiff, the concrete evidence must at least reflect litigation is “realistically contemplated.” *See* Open Records Decision No. 518 at 5 (1989); *see also* Attorney General Opinion MW-575 (1982) (finding investigatory file may be withheld if governmental body attorney determines it should be withheld pursuant to Gov’t Code § 552.103 and that litigation is “reasonably likely to result”). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* ORD 452 at 4.

You explain the Texas Commission on Environmental Quality is in the process of entering an Agreed Order (the “order”) requiring Exide to control emission. You further explain that this order would authorize a private lawsuit to enforce Exide’s compliance with the order. You inform us the city may file suit to enforce Exide’s compliance with the order. You state that based on the impact Exide’s operations have had, and may continue to have, the city anticipates filing litigation. You also state the submitted information is related to the anticipated litigation. Based on your representations and documentation, our review of the information at issue, and the totality of the circumstances, we find the information not subject to section 552.022 of the Government Code is related to litigation the city reasonably anticipated on the date of its receipt of this request for information. We therefore conclude the city may withhold this information under section 552.103 of the Government Code.

We note, 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. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing parties in the pending litigation is not excepted from disclosure under section 552.103(a), and must be disclosed. 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, the city must release the completed reports, which we have marked, pursuant to section 552.022(a)(1) 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,

A handwritten signature in blue ink, appearing to read "Tamara Wilcox". The signature is fluid and cursive, with a long horizontal stroke at the beginning.

Tamara Wilcox
Assistant Attorney General
Open Records Division

TW/dls

Ref: ID# 425817

Enc. Submitted documents

c: Requestor
(w/o enclosures)