



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 28, 2011

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

OR2011-19051

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# 440654.

The City of Frisco (the "city"), which you represent, received two requests from different requestors for information related to battery pieces or chips that were used as road base or in parking lots. You state the city has released some of the requested information, but 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. We have also considered comments submitted by one of the requestors. *See* Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

We first note portions of the information at issue are subject to section 552.022 of the Government Code. Section 552.022(a) provides in relevant part the following:

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 unless made confidential under this chapter or 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;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Act of May 30, 2011, 82nd Leg., R.S., S.B. 602, § 2 (to be codified as an amendment to Gov't Code § 552.022(a)). Although you assert this information is excepted from disclosure under section 552.103, this section is discretionary and does not make information confidential under the Act. *Id* §§ 3-21, 23-26, 28-37 (providing for “confidentiality” of information under specified exceptions); *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); Open Records Decision No. 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, the city may not withhold the information subject to section 552.022, which we have marked, under section 552.103. However, section 552.136 of the Government Code makes information confidential under chapter 552.<sup>1</sup> *See* Gov't Code § 552.136. Therefore, we will consider whether this section requires you to withhold any of the information subject to section 552.022.

Section 552.136(b) of the Government Code provides that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” This office has determined an insurance policy number is an access device number for purposes of section 552.136. Open Records Decision No. 684 at 9 (2009). Thus, the city must withhold the insurance policy numbers we have marked under section 552.136. However, the city must release the remaining information subject to section 552.022.

You assert the information not subject to section 552.022 is excepted from disclosure under section 552.103 of the Government Code, which provides in part the following:

(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

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<sup>1</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body. *See* Open Records Decision Nos. 481 at 2 (1987), 480 at 5 (1987); *see, e.g.*, Open Records Decision No. 470 at 2 (1987) (because release of confidential information could impair rights of third parties and because improper release constitutes a misdemeanor, attorney general will raise predecessor statute of section 552.101 on behalf of governmental bodies).

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 [1<sup>st</sup> 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 city is involved in a dispute with Exide Technologies ("Exide") concerning Exide's emissions from its battery recycling plant. You state, and have provided documentation demonstrating, the Texas Commission on Environmental Quality, in cooperation with the city, is in the process of entering into an agreed order requiring Exide to control emissions from its operations. You inform us the order will incorporate federal regulations which would authorize a private lawsuit to enforce Exide's compliance. You state the city may file suit to ensure Exide's compliance. Based on your representations and documentation, our review of the remaining responsive information, and the totality of the circumstances, we find the city reasonably anticipated litigation when it received request for information. However, the city has not explained how the information at issue, which

pertains to battery pieces or chips used as road base or in parking lots, but not to Exide emissions, relates to the anticipated litigation. Thus, you have not established the remaining information is excepted from disclosure under section 552.103 on that ground.

The remaining information contains e-mail addresses of members of the public. Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). Section 552.137 does not apply to a government employee’s work e-mail address because such an address is not that of the employee as a “member of the public,” but is instead the address of the individual as a government employee. The e-mail addresses at issue do not appear to be of a type specifically excluded by section 552.137(c). Further, you do not inform us a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. Therefore, the city must withhold the e-mail addresses we have marked under section 552.137; however, one of the requestors has a right of access to her own e-mail address under section 552.137(b).

Finally, we note some of the materials to be released may be protected by copyright. A custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Open Records Decision No. 180 at 3 (1977). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.*; *see* Open Records Decision No. 109 (1975). If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit.

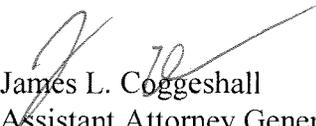
To conclude, the city must withhold the information we have marked under sections 552.136 and 552.137 of the Government Code; however, one of the requestors has a right of access to her own e-mail address under section 552.137(b) of the Government Code. The city must release the remaining information, but any copyrighted information may only be released in accordance with copyright law.

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,



James L. Coggeshall  
Assistant Attorney General  
Open Records Division

JLC/ag

Ref: ID# 440654

Enc. Submitted documents

c: 2 Requestors  
(w/o enclosures)