



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 30, 2011

Ms. Michelle T. Rangel
Assistant County Attorney
Fort Bend County
301 Jackson St., Suite 728
Richmond, Texas 77469

OR2011-19229

Dear Ms. Rangel:

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# 441019.

Fort Bend County (the "county") received a request for (1) notices of regulatory violations from any county agency or department; (2) any proposed county improvements, road widening, or condemnation actions within five miles of the specified shopping center with respect to West Airport Blvd. and State Hwy. 6; (3) all permits and other building and operational permits issued by any county agency or department; (4) county regulations; and (5) the county's most recent "Verification Letter" regarding building codes, certificates of occupancy and zoning ordinances issued by the county engineer pertaining to a specified shopping center and its tenants. You claim that the submitted information is excepted from disclosure under sections 552.103 and 552.105 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.¹ We assume the county has released any other information that is responsive to this request, to the extent such information existed when the county received the request.

¹We assume the "representative sample" of information 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 those records contain substantially different types of information than those submitted to this office.

If not, then any such information must be released immediately.² See Gov't Code §§ 552.221, .301, .302; Open Records Decision No. 664 (2000).

Initially, we note the submitted information contains completed appraisal reports that are subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body [,]” unless the information is expressly confidential under “other law” or excepted from disclosure under section 552.108 of the Government Code. Gov't Code § 552.022(a)(1). 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. 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 county may not withhold the information subject to section 552.022, which we have marked, under section 552.103, but instead must release it to the requestor. We will consider your arguments under sections 552.103 and 552.105 of the Government Code for the information not subject to section 552.022 of the Government Code.

We next address your claim under section 552.103 of the Government Code. Section 552.103 provides 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). 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

²We 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 Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

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 that prior to the county's receipt of this request, litigation was reasonably anticipated. You inform this office the county will file condemnation suits with respect to two of the land parcels at issue. You further state the information at issue not subject to section 552.022 is related to the anticipated litigation because it pertains to the land parcels at issue. Accordingly, we find litigation was reasonably anticipated when the county received this request for information and the information at issue relates to the anticipated litigation. Therefore, we conclude section 552.103 of the Government Code is generally applicable to the information we have marked.

In reaching this conclusion, we assume the opposing parties in the anticipated litigation have not already seen or had access to any 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 to obtain information relating to litigation through discovery procedures. *See* ORD 551 at 4-5. If the opposing parties have seen or had access to information relating to litigation, through discovery or otherwise, there is no interest in withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We also note 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).

We next address your argument under section 552.105 of the Government Code for the remaining information. Section 552.105 excepts from disclosure information relating to:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Gov't Code § 552.105. Section 552.105 is designed to protect a governmental body's planning and negotiating position with respect to particular transactions. Open Records Decision Nos. 564 at 2 (1990), 357 (1982), 310 (1982). Information that is excepted from disclosure under section 552.105 that pertains to such negotiations may be excepted from disclosure so long as the transaction relating to that information is not complete. *See* ORD 310. But the protection offered by section 552.105 is not limited solely to transactions not yet finalized. This office has concluded that information about specific parcels of land

obtained in advance of other parcels to be acquired for the same project could be withheld where release of the information would harm the governmental body's negotiating position with respect to the remaining parcels. *See* ORD 564 at 2. A governmental body may withhold information "which, if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" ORD 357 at 3 (quoting Open Records Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiating position with regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body's good-faith determination in this regard, unless the contrary is clearly shown as a matter of law. *See* ORD 564.

You explain the county still needs to purchase the land parcel at issue and indicates release of the information at issue would harm the county's negotiating position with respect to the acquisition of the specified land parcel. Based on your representations and our review, we conclude the county may withhold the information we have marked under section 552.105 of the Government Code.

In summary, the county may withhold the information we have marked under sections 552.103 and 552.105 of the Government Code. We note the applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. The remaining 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, 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,



Sean Opperman
Assistant Attorney General
Open Records Division

SO/dls

Ref: ID# 441019

Enc. Submitted documents

c: Requestor
(w/o enclosures)