



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 17, 2012

Ms. Tiffany N. Evans
Assistant City Attorney
City of Houston
P.O. Box 368
Houston, Texas 77001-0368

OR2012-07374

Dear Ms. Evans:

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# 453951 (GC No. 19436).

The Houston Airport System (the "system") received a request for all inter-office correspondence from March 1, 2010 to March 31, 2010, as well as notes from specified individuals pertaining to a specified topic. 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 interested party may submit comments stating why information should or should not be released).

As a preliminary matter, the requestor states the system has previously released some of the requested information to him pursuant to prior open records requests. Thus, the requestor argues the system has waived its claim under section 552.103 of the Government Code by previously releasing the requested information to the public. Section 552.007 of the Government Code provides that if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law or the information is confidential under law. *See* Gov't Code 552.007; Open Records Decision No. 518 at 3 (1989); *see also* Open Records Decision No. 400 (1983) (governmental body may waive right to claim permissive exceptions to disclosure under the Act, but it may not disclose

information made confidential by law). Based on our review of the submitted information, it appears the system has already released a portion of the submitted information to the requestor. Section 552.103 is a discretionary exception under the Act and does not make information confidential under law or expressly prohibit its release for purposes of section 552.007. 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). Accordingly, as the information we have marked has already been released to the public, the system may not now withhold that information under section 552.103 of the Government Code. However, we are able to determine the remaining information has not previously been released. Thus, we will consider the system's claim under section 552.103 for the remaining information.

Section 552.103 of the Government Code 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). The system 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 that (1) litigation was pending or reasonably anticipated on the date of the receipt of the request for information and (2) the information at issue is related to the pending or anticipated 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). The system must meet both prongs of this test for information to be excepted under section 552.103(a).

You claim the remaining information pertains to pending litigation. You state, and have provided documentation showing, that two lawsuits were filed against the City of Houston (the "city") in the Harris County Probate Court No. 2 prior to the date the system received the request. However, we note the system is not a party to these proceedings. In such a situation, we require an affirmative representation from a governmental body with the

litigation interest that the governmental body wants the information at issue withheld from disclosure under section 552.103. You provide an affidavit from the city stating it objects to release of the information at issue because it relates to pending litigation against the city. Based on your representations and those of the city, we determine the litigation was pending on the date the system received the request for information. You state the information at issue relates to issues raised in the pending litigation. Based on your representations and our review, we find the remaining information is related to the pending litigation for the purposes of section 552.103. Accordingly, the system may withhold the remaining information under section 552.103 of the Government Code on behalf of the city.

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. Open Records Decision Nos. 349 (1982), 320 (1982). Further, the applicability of section 552.103(a) ends once the litigation has concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, the system must release the information it has already made available to the public, which we have marked, pursuant to section 552.007 of the Government Code. The system 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,



Vanessa Burgess
Assistant Attorney General
Open Records Division

VB/dls

Ref: ID# 453951

Enc. Submitted documents

c: Requestor
(w/o enclosures)