



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 23, 2012

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

OR2012-07854

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# 454472 (Houston GC No. 19434).

The City of Houston (the "city") received a request for effluent lab test results and chain of custody documents pertaining to the requestor's company for each lab report dated 2004-2012. 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 information.

Initially, we note you have not submitted any responsive information related to effluent lab test results and chain of custody documents from 2004. To the extent the city maintained information responsive to this aspect of the request on the date the city received the request, we assume it has been released. If the city has not released this information, it must do so at this time. *See Gov't Code §§ 552.301, .302; see also Open Records Decision No. 664 (2000)* (if governmental body concludes no exceptions apply to requested information, it must release information as soon as possible).

Next, we note portions of the submitted information were the subject of two previous requests for information, in response to which this office issued Open Records Letter Nos. 2012-02884 (2012) and 2012-05684 (2012). In these rulings, we determined the city must release completed reports subject to section 552.022 of the Government Code, and may

withhold the remaining information at issue under section 552.103 of the Government Code. We have no indication the law, facts, or circumstances on which these prior rulings were based have changed. Accordingly, to the extent the submitted information is identical to the information previously requested and ruled upon by this office in these prior rulings, the city must continue to rely on Open Records Letter Nos. 2012-02884 and 2012-05684 as previous determinations and withhold or release the identical information in accordance with these rulings. *See* Open Records Decision No. 673 at 6-7 (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure).

Next, we note the remaining submitted information includes lab test reports subject to section 552.022 of the Government Code. Section 552.022(a)(1) provides for the required public disclosure of “a completed report, audit, evaluation, or investigation made of, for, or by a governmental body” unless it is excepted by section 552.108 or made confidential under the Act or other law. Gov’t Code § 552.022(a)(1). Although you raise section 552.103 of the Government Code for this information, this is a discretionary exception that may be waived and does not make information confidential under the Act. *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), 663 at 5 (1999) (waiver of discretionary exceptions). As such, section 552.103 does not make information confidential for the purposes of section 552.022(a)(1), and the city may not withhold the lab test reports on that basis. As you raise no additional exceptions to disclosure, the reports, which we have marked, must be released. However, we will address your argument against disclosure 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). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception applies in a 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 requested information is related to that litigation. *See 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 governmental body must meet both parts of this test for information to be excepted under section 552.103(a).

You state a lawsuit styled *Downstream Environmental, L.L.C. v. The City of Houston, Texas and Dannelle Belhateche*, Cause No. 201129293-7, is currently pending in the 295th Judicial District Court in Harris County, Texas. You state, and provide documentation showing, this lawsuit was filed prior to the city's receipt of the instant request. Therefore, we agree litigation was pending on the date the city received the request for information. You also state the information at issue pertains to the substance of the lawsuit claims. Based on your representations and our review, we find the remaining information is related to the pending litigation. Accordingly, the city may withhold the remaining information under section 552.103 of the Government Code.

We note 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. Therefore, once the information at issue has been obtained by all parties to the litigation through discovery or otherwise, a section 552.103(a) interest no longer exists as to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We also note 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, to the extent the submitted information is identical to the information previously requested and ruled upon in Open Records Letter Nos. 2012-02884 and 2012-05684, the city must continue to rely on these rulings as previous determinations and withhold or release the identical information in accordance with these rulings. The city must release the information we have marked under 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 cursive script, appearing to read "Kristi L. Wilkins".

Kristi L. Wilkins
Assistant Attorney General
Open Records Division

KLW/bhf

Ref: ID# 454472

Enc. Submitted documents

c: Requestor
(w/o enclosures)