



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

September 19, 1994

Mr. Edwin M. Snyder  
First Assistant City Attorney  
City of Plano  
P.O. Box 860358  
Plano, Texas 75086-0358

OR94-559

Dear Mr. Snyder:

The City of Plano (the "city") has asked whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned the request ID# 26860.

The city received a request for information concerning a construction project. The city contends that the requested information is excepted from disclosure under section 552.103(a). To show the applicability of section 552.103(a), a governmental entity must show that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to that litigation. *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 (1990) at 4. A governmental entity has the burden of meeting both prongs of this test for information to be excepted from disclosure under section 552.103(a).<sup>1</sup>

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<sup>1</sup>You state that it should not be necessary for this office to review the documents at issue to determine that they are excepted from disclosure under section 552.103(a). You ask if the city will be required to provide documents to this office in order to invoke section 552.103(a) "in the future in a substantially similar situation."

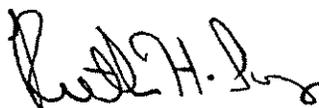
In Open Records Decision No. 551 (1990) at 5, this office stated that

where our review of a governmental body's decision to withhold information pursuant to the litigation exception indicates that the governmental body has reasonably established the relatedness of the subject matter of the requested information to the litigation, the discovery process should be allowed to operate.

The city submitted to this office information that shows the city is engaged in litigation involving the construction project. The city also submitted a representative sample of information responsive to the request. A review of this information indicates that it is related to the pending litigation. It is possible, however, that the opposing party in the litigation has already had access to some of the documents at issue. Absent special circumstances, once information has been obtained by all parties to the litigation, e.g., through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision No. 349 (1982) at 2. If the opposing party to the litigation has seen or had access to any of the information at issue, there is no justification for now withholding that information from the requestor pursuant to section 552.103(a). To the extent that the opposing party in the pending litigation has not already seen or had access to the information at issue, it may be withheld from disclosure under section 552.103(a).<sup>2</sup>

We note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982) at 3. Since the section 552.103(a) exception is discretionary with the governmental entity asserting the exception, it is also within the city's discretion to release this information to the requestor. Gov't Code § 552.007; Open Records Decision No. 542 (1990) at 4. We are resolving this matter with an informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Ruth H. Soucy  
Assistant Attorney General  
Open Government Section

RHS/rho

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We asked you to send the documents at issue so that this office could review the documents to see if they were related to the litigation. Supplying the documents at issue for this office to review is part of the city's burden in showing the applicability of section 552.103. You should also submit responsive documents when seeking a decision from this office in the future.

<sup>2</sup>In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499, 497 (1988) (where requested documents are numerous and repetitive, governmental body should submit representative sample; but if each record contains substantially different information, all must be submitted). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Ref.: ID# 26860

, Enclosures: Submitted documents

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