



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 27, 1995

Ms. Lan P. Nguyen
Assistant City Attorney
City of Houston
P.O. Box 1562
Houston, Texas 77251-1562

OR95-997

Dear Ms. Nguyen:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act (the "act"), chapter 552 of the Government Code. Your request was assigned ID# 34627.

The City of Houston (the "city") received a request for a copy of a deed restriction complaint and any other related documents. On behalf of the city, you state that the requestor has been notified that some of the requested information will be released. However, you assert that the remaining documents should be withheld pursuant to sections 552.103(a) and 552.107(1) of the act. You have submitted those documents to this office for our review.

We first address your assertion that the requested information is excepted from required public disclosure by section 552.103(a) of the act. This section, commonly referred to as the litigation exception, excepts from required public disclosure information relating to litigation "to which the state or political subdivision . . . is or may be a party." Gov't Code § 552.103(a). More specifically, section 552.103(a) excepts from required public disclosure, information

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or maybe a party or to which an officer or employee of the state or political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from required public inspection.

Section 552.103(a) is designed to keep the Open Records Act from operating as a method of avoiding the rules of discovery. Attorney General Opinion JM-1048 (1989) at 4. In Open Records Decision No. 551 (1990) at 3, this office stated:

[Section 552.103] enables governmental entities to protect their position in litigation by forcing parties seeking information relating to that litigation to obtain it through discovery, if at all. [citations omitted.] We do not believe that the Open Records Act was intended to provide parties involved in litigation any earlier or greater access to information than was already available directly in such litigation.

Section 552.103 requires concrete evidence that litigation is realistically contemplated; it must be more than mere conjecture. Open Records Decision Nos. 516 (1989) at 5, 328 (1982). Thus, to secure the protection of this exception, a governmental body must demonstrate that requested information "relates" to a pending or reasonably anticipated judicial or quasi-judicial proceeding. Open Records Decision No. 551 (1990); *see also* Open Records Decision No. 588 (1991) (contested case under Administrative Procedure Act is litigation for purpose of section 552.103 exception). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4.

You have enclosed documents verifying that the city has received a complaint regarding a violation of a recorded deed restriction of a subdivision located within its boundaries and that the city has issued a letter of notice to the owners of record of the property subject to the restriction. The information submitted also indicates that the city reasonably anticipates judicial proceedings concerning this matter as authorized by chapters 230 and 54 of the Local Government Code.¹

We conclude that the city has demonstrated that litigation is reasonably anticipated in this particular instance. Thus, the city may withhold the requested information based on section 552.103 of the Government Code. However, if the parties to the litigation obtain access to these documents through the discovery process or otherwise, no section 552.103(a) interest will generally exist in that information.

¹We note that the recorded deed restriction is a public record and must be disclosed pursuant to the provisions of the act.

Open Records Decision Nos. 349 (1982), 320 (1982). Thus, if all of the opposing parties in the litigation have access to these documents, there is no justification for withholding that information from the requestor pursuant to section 552.103(a). We also note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982).

Because this information may be withheld pursuant to section 552.103(a), we do not address your section 552.107(1) argument. We are resolving this matter with an *informal letter ruling rather than with a published open records decision*. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Toya Cirica Cook
Assistant Attorney General
Open Records Division

TCC/RHS/rho

Ref: ID# 34627

Enclosures: Submitted documents

cc: Mr. Randy Browne
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(w/o enclosures)