



October 19, 2001

Ms. Tracy A. Ponders
Assistant City Attorney
City of Dallas
1500 Marilla, Room 7BN
Dallas, Texas 75201

OR2001-4730

Dear Ms. Ponders:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 153645.

The City of Dallas (the "city") received a written request for the following categories of information maintained by the city from January 1, 1995 to the present:

- a. Contracts with [certain named individuals and entities] in connection with services provided as a part of the Home Improvement Loan Program.
- b. Documents supporting payments made to [certain named individuals and entities] in connection with services provided as a part of the Home Improvement Loan Program.
- c. Agreements with all lenders, private or public, regarding funds used for home repairs and construction performed in connection with the Home Improvement Loan Program.
- d. City ordinances, code, and council resolutions regarding the adoption, formation, and governance of the Home Improvement Loan Program.
- e. Documents describing payments received from the United States government, the department of Housing and Urban Development, or any

other federal agency in connection with the Home Improvement Loan Program.

f. Documents made in connection with each investigation of alleged fraud, waste and/or abuse regarding the Home Improvement Loan Program.

You characterize this request as "relating to an investigation of fraud in the City's Home Improvement Loan Program currently in possession of the Dallas Police Department, a sample of which is attached hereto as Exhibit B." You contend that the requested information is excepted from public disclosure pursuant to sections 552.103 and 552.108 of the Government Code.¹

Before we address the applicability of the exceptions you raised, we must first address a procedural matter. Section 552.301 of the Government Code dictates the procedure that a governmental body must follow when it seeks a decision from the attorney general as to whether requested information falls within an exception to disclosure. Among other requirements, the governmental body must submit to this office within fifteen business days of receipt of an information request "a copy of the specific information requested, or . . . representative samples of the information if a voluminous amount of information was requested." Gov't Code § 552.301(e)(1)(D). Otherwise, the requested information "is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information." Gov't Code § 552.302.

You have not submitted to this office a copy of information responsive to items c or e listed above. We therefore have no basis on which to conclude that there exists a compelling reason for withholding these categories of information. Consequently, we have no choice but to conclude that the information requested in items c and e is presumed to be public under section 552.302 and therefore must be released to the requestor. If you believe the information is confidential and may not lawfully be released, you must challenge the ruling in court as outlined below.

We next note that the information requested in item d, *i.e.*, city ordinances, code, and council resolutions regarding the Home Improvement Loan Program, is specifically made public under section 552.022 of the Government Code. Section 552.022(a) provides in pertinent part as follows:

¹In reaching our conclusion here, we assume that the "representative sample" of records submitted to this office is truly representative of the records pertaining to the pending criminal investigation. *See* Open Records Decision No. 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 that those records contain substantially different types of information than that submitted to this office.

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

....

(8) a statement of the general course and method by which an agency's functions are channeled and determined, including the nature and requirements of all formal and informal policies and procedures;

....

(10) a substantive rule of general applicability adopted or issued by an agency as authorized by law . . . ;

....

(13) a policy statement or interpretation that has been adopted or issued by an agency; [and]

(14) administrative staff manuals and instructions to staff that affect a member of the public[.]

Therefore, the city may withhold those records responsive to item d only if they are made confidential under other law. Although you argue that the records are excepted under sections 552.103 and 552.108 of the Government Code, these provisions are discretionary exceptions and therefore are not "other law" for purposes of section 552.022. *See, e.g.,* Open Records Decision Nos. 665 at 2 n.5 (2000) (governmental body may waive section 552.103). Accordingly, the city must release all documents responsive to item d pursuant to section 552.022 of the Government Code.

We now address the applicability of sections 552.103 and 552.108 to the remainder of the information you submitted to this office. Section 552.103 of the Government Code is commonly referred to as the "litigation exception." Under section 552.103(a) and (c), the governmental body raising this exception must demonstrate that (1) litigation involving the governmental body was pending or reasonably anticipated at the time of the records request, and (2) the information at issue is related to that litigation. *See also University of Tex. Law Sch. v. Texas 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. In this instance, you

have not explained, nor do the documents at issue demonstrate, that the city reasonably anticipated litigation prior to the city's receipt of the current records request. We therefore conclude that the city may not withhold any of the requested information pursuant to section 552.103.

Section 552.108(a)(1) of the Government Code excepts from required public disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if . . . release of the information would interfere with the detection, investigation, or prosecution of crime." Section 552.108(a)(1) protects information pertaining to a pending criminal investigation or prosecution because the release of such information presumptively would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976). You state that the submitted records pertain to a pending investigation of criminal fraud, and that the release of the requested information "will alert the parties that they are under investigation, allowing them to thwart it." Based on these representations, we conclude that the city may withhold the remaining submitted documents pursuant to section 552.108(a)(1) of the Government Code.

We note, however, that the requestor also seeks "each investigation of alleged fraud, waste and/or abuse regarding the Home Improvement Loan Program." You have not asserted or otherwise demonstrated that records pertaining to any other investigation of "fraud, waste and/or abuse" in connection with the Home Improvement Loan Program are the subject of a pending criminal investigation. Nor have you submitted records of such investigations to our office for review. *See Gov't Code § 552.301(e)(1)(D)*. Accordingly, we conclude that you have not met your burden of demonstrating that records pertaining to any other investigation of fraud, waste, or abuse is excepted from public disclosure. Accordingly, we conclude that, to the extent they exist, the city must release in their entirety all records pertaining to any such investigation other than those submitted to this office.

In summary, the city must release 1) agreements with all lenders, private or public, regarding funds used for home repairs and construction performed in connection with the Home Improvement Loan Program; 2) city ordinances, code, and council resolutions regarding the adoption, formation, and governance of the Home Improvement Loan Program; 3) documents describing payments received from the United States government, the department of Housing and Urban Development, or any other federal agency in connection with the Home Improvement Loan Program; and 4) documents made in connection with any other investigation of alleged fraud, waste and/or abuse regarding the Home Improvement Loan Program other than those records you submitted to our office. The city may withhold the remaining records you submitted to our office pursuant to section 552.108 of the Government Code.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink that reads "Michael A. Pearle". The signature is written in a cursive style with a large initial "M".

Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/RWP/seg

Ref: ID# 153645

Enc. Submitted documents

c: Ms. Grace Weatherly
Wood, Thackerly & Weatherly, P.C.
400 North Carroll Boulevard, Suite 202
Denton, Texas 76201
(w/o enclosures)