



June 11, 2002

Ms. April M. Virnig
Taylor Olson Adkins Sralla Elam
6000 Western Place Suite 200
Fort Worth, Texas 76107-4654

OR2002-3151

Dear Ms. Virnig:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 164158.

The City of Granbury (the "city"), which you represent, received a request for fourteen types of information, including information relating to (1) four named individuals' financial disclosure statements for 2000 and 2001; (2) the city's ethics policies; (3) city council members' voting records regarding certain matters; (4) planning and zoning variances requested or recommended; (5) certain property at 650 East Pearl Street; (6) correspondence with an abstract and title company during 2000 and 2001; (7) two named individuals' employment applications; (8) communications with Texas Parks and Wildlife Foundation and/or Texas Parks and Wildlife; (9) grant money applied for and/or received for construction of a park; (10) correspondence with the Brazos River Authority during the last two years relating to transfer of property; and (11) land purchased by the city in the last three years. You state that the city has released some of the requested information. The city claims that other responsive information is excepted from disclosure under sections 552.103, 552.107, 552.117, and 552.130 of the Government Code. We have considered the exceptions you raise and have reviewed the information you submitted. We note that you have not submitted the information that you describe as appearing at Tab G. Therefore, if the city has not already released that information, it must do so at this time. *See Gov't Code §§ 552.301, .302; Open Records Decision No. 664 (2000).*

We also note that the letter to the city manager that you have submitted at Tab A contains a request for information. In relevant part, this letter asks that the city

inform us if, in fact, such a transfer [of certain property] has occurred and, if so, the name of the transferee, the date of the transfer, the consideration paid for the transfer and the purpose of the transfer, as the city sees it.

Generally, a request for information need not refer to chapter 552 of the Government Code or be addressed to the officer for public information. *See* Open Records Decision Nos. 497 at 3 (1988), 44 at 2 (1974). As a hyper-technical reading of chapter 552 does not effectuate its purpose, a written communication that can reasonably be judged to be a request for public information constitutes a request for information under chapter 552. *Id.* Thus, the quoted language of the letter constitutes a request for information. A governmental body is not required to answer factual questions, conduct legal research, or create new information in responding to a request for information under chapter 552. *See* Open Records Decision Nos. 563 at 8 (1990), 555 at 1-2 (1990). Likewise, a governmental body is not required to take affirmative steps to create or obtain information that is not in its possession, so long as no other individual or entity holds that information on behalf of the governmental body that receives the request for it. *See* Gov't Code § 552.002(a); Open Records Decision Nos. 534 at 2-3 (1989), 518 at 3 (1989). However, a governmental body that receives a request for information must make a good-faith effort to relate the request to information that is within the governmental body's custody or control. *See* Open Records Decision No. 561 at 8-9 (1990). Therefore, insofar as the city has not already released information that is responsive to the letter at Tab A, it must do so at this time. *See* Gov't Code §§ 552.301, .302; Open Records Decision No. 664 (2000). However, chapter 552 of the Government Code does not require the city to release information that did not exist when it received the letter or to create responsive information. *See* Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

Next, we note that some of the information at Tab E is subject to section 552.022 of the Government Code. Section 552.022 provides that

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:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108;

...

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(1), (3). The information at Tab E includes a document that constitutes a completed report. The city must release that document under section 552.022(a)(1) unless it is excepted from disclosure under section 552.108 or expressly

confidential under other law. Also, some of the information at Tab E is contained in a voucher or contract that relates to the city's receipt or expenditure of public or other funds. The city must release that type of information under section 552.022(a)(3) unless it is expressly confidential under other law. Sections 552.103 and 552.107 of the Government Code are discretionary exceptions to disclosure that protect the governmental body's interests and may be waived. As such, these exceptions are not other law that makes information confidential for the purposes of section 552.022. *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); Open Records Decision Nos. 630 at 4-7 (1994) (section 552.107(1) may be waived), 542 at 4 (1990) (litigation exception may be waived). Therefore, the information at Tab E that is subject to section 552.022(a)(1) or (3) may not be withheld from disclosure under sections 552.103 or 552.107. We have marked the information at Tab E that the city must release under section 552.022.

The city claims that the rest of the information at Tab E is excepted from disclosure under section 552.103 of the Government Code. This exception provides in 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 governmental body has the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request for information *and* (2) that the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479 (Tex. App. – Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App. – Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *Id.*

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To establish that litigation is reasonably anticipated, a governmental body must provide this office with “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” *Id.* Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission (“EEOC”), *see* Open Records Decision No. 336 (1982); (2) hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

You assert that the remaining information at Tab E relates to litigation that the city reasonably anticipated when it received this request for information. You contend that two letters from an attorney “clearly put the city on notice that litigation is anticipated.” Based on your representations and our review of these letters, we find that the city has demonstrated that litigation was reasonably anticipated on the date of its receipt of this request for information. We also find that the remaining information at Tab E relates to the anticipated litigation.

We note, however, that the remaining information at Tab E includes information that the opposing party to the anticipated litigation already has seen or to which he previously has had access. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties seeking information relating to the litigation to obtain it through discovery procedures. *See* Open Records Decision No. 551 at 4-5 (1990). Therefore, to the extent that the opposing party has seen or had access to information that relates to the anticipated litigation, through discovery or otherwise, there is no interest in now withholding such information from public disclosure under section 552.103. *See* Open Records Decision Nos. 349 (1982), 320 (1982). We have marked the types of documents that the city may not withhold under section 552.103 because the opposing party already has seen or previously has had access to them. Likewise, the city may not withhold the minutes of city council meetings under section 552.103. *See* Gov’t Code § 551.022 (minutes of open meeting are public records and shall be available for public inspection and copying on request); Open Records Decision No. 221 (1979) (litigation exception not applicable to official records of governmental body’s public proceedings). With the exception of these types of documents and the information that is subject to section 552.022, the city may withhold the information at Tab E at this time under section 552.103. The applicability of section 552.103 ends once the related litigation concludes or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

The documents that are not excepted from disclosure under section 552.103 contain bank account numbers. These account numbers are confidential under section 552.136, which the Seventy-seventh Legislature added to chapter 552 of the Government Code. This exception provides as follows:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

(1) obtain money, goods, services, or another thing of value;
or

(2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. In this instance, the requestor has a special right of access to the bank account numbers. *See* Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individual asks governmental body to provide him with information concerning himself). Information that is subject to a special right of access under section 552.023 may not be withheld from the requestor under section 552.136. However, should the city receive another request for this information from a person who would not have a right of access to it, the city should resubmit this same information and request another decision.

The city also claims that some of the information at Tab F is excepted from disclosure under section 552.117 of the Government Code. Section 552.117(1) excepts from public disclosure the home address, home telephone number, and social security number of a current or former official or employee of a governmental body, as well as information that reveals whether the person has family members, if the current or former official or employee requested that this information be kept confidential under section 552.024. *See* Open Records Decision Nos. 622 at 5-6 (1994), 455 at 2-3 (1987). This information may not be withheld, however, if the current or former official or employee made the request for confidentiality under section 552.024 after the request for information was made. Whether a particular piece of information is public must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). In this instance, the city has demonstrated that the highlighted section 552.117 information at Tab F pertains to persons who timely elected

under section 552.024 to keep this information confidential. Therefore, the city must withhold this information under section 552.117 of the Government Code.

Lastly, we note that other information at Tab F relates to a driver's license. Section 552.130 of the Government Code excepts from disclosure information that relates to "a motor vehicle operator's or driver's license or permit issued by an agency of this state." Gov't Code § 552.130(a)(1). If the information that we have marked at Tab F relates to a Texas driver's license, then the city must withhold that information under section 552.130.

In summary, some of the information at Tab E is excepted from disclosure at this time under section 552.103 of the Government Code. Some of the information at Tab F must be withheld under section 552.117. Texas driver's license information must be withheld under section 552.130. The city must release the rest of the requested information. As sections 552.103, 552.117, and 552.130 are dispositive, we need not address the city's claim under section 552.107.

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).

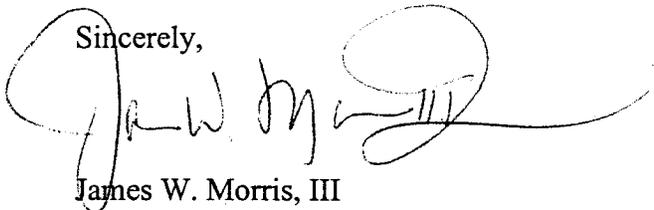
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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, appearing to read 'J.W. Morris III', with a large, stylized flourish extending to the right.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/sdk

Ref: ID# 164158

Enc: Marked documents

c: Ms. Jennifer S. Riggs
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(w/o enclosures)