



August 20, 2002

Ms. Nancy O. Williams
Assistant City Attorney
City of Irving
825 West Irving Boulevard
Irving, Texas 75060

OR2002-4629

Dear Ms. Williams:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 167383.

The City of Irving (the "city") received a request for all records relating to wastewater released from the facility of Dallas Peterbilt, Inc. at 515 North Loop 12, Irving, Texas. You claim that the requested information is excepted from disclosure under sections 552.103 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing that interested party may submit comments stating why information should or should not be released).

Initially, the requestor asserts that the city did not provide notice of the city's request for a decision from this office within the ten-business-day time period mandated under section 552.301(d) of the Government Code. A governmental body's failure to comply with section 552.301 results in the legal presumption that the information at issue is public and must be released, unless there is a compelling reason to withhold the information. Gov't Code § 552.302. In this case, we note that your request for a decision to this office, which was timely submitted, indicates that you sent a copy of the letter to the requestor via facsimile. As the requestor provides no documentation to the contrary, we determine that you have provided the required notice pursuant to section 552.301(d).

Next, we note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

- (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:

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

The submitted documents include a completed incident report that may be withheld from disclosure only if it is excepted from disclosure under section 552.108 of the Government Code or is confidential under other law. You contend that “[s]ome of the records requested . . . deal with the detection, investigation, or prosecution of crime” and are excepted under section 552.108. We find, however, that you have not marked the submitted records to indicate which information you contend is excepted from disclosure under section 552.108. See Gov’t Code § 552.301(e)(2) (governmental body receiving an open records request for information that it wishes to withhold is required to label a copy of the information to indicate which exceptions apply to which parts of the information). Therefore, you have not demonstrated, nor can we determine, that you seek to withhold the incident report at issue under section 552.108. You also contend that “all of the documents are also excepted under section 552.103(a).” Section 552.103 of the Government Code is a discretionary exception that protects the governmental body’s interests and is not other law purposes of section 552.022. See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.–Dallas 1999, no pet.) (governmental body may waive section 552.103). Thus, the city may not withhold the incident report under section 552.103. As you raise no other exceptions to disclosure, we determine that the city must release the marked incident report pursuant to section 552.022 of the Government Code.

We next address your argument under section 552.103 with respect to the remaining information. Section 552.103 of the Government Code provides as follows:

(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.

A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable 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 information at issue is related to that litigation. *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 552.103(a).

You state that the city is a party to pending criminal litigation against an officer of Dallas Peterbilt, Inc. in the Municipal Court of the City of Irving, Dallas County. You have provided a copy of the Violation Summons in *City of Irving v. John D. Moore*, Cause No. V003036-01, issued January 23, 2002, charging the officer with unlawfully depositing or discharging industrial waste into a sanitary sewer without a permit. Upon review, we find that the city was a party to pending litigation when it received the present request. Furthermore, we find that the requested records are related to the pending litigation.

We note, however, that once information has been obtained by all parties to litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Here, it is clear from our review of the documents at issue that the opposing party has seen or had access to one of the submitted documents. We determine that the documents provided to or obtained by the opposing party may not be withheld under section 552.103 and must be released. With the exception of the marked incident report and the document previously seen or obtained by the opposing party, we conclude that the city may withhold the remaining documents under section 552.103. We also note that the applicability of section 552.103(a) ends when the litigation is concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982)

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,



David R. Saldivar
Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 167383

Enc: Submitted documents

c: Mr. Steve Morton
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(w/o enclosures)