



October 9, 2002

Ms. Kimberly A. Frost
Vinson & Elkins, L.L.P.
One American Center, Suite 2700
600 Congress Avenue
Austin, Texas 78701-3200

OR2002-5733

Dear Ms. Frost:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 170456.

The Port of Houston Authority (the "authority") received a request for information relating to the authority's acquisition of real property in the City of Seabrook (the "city"), as well as to a specific bond referendum. You inform us that the authority does not seek to withhold from the requestor parts three through five of the requested information. However, you inform us that the authority does seek to withhold from the requestor portions of the requested information on three grounds. First, you state that, in Open Records Letter No. 02-3855 (2002), this office ruled that a request by the city for the identical information at issue in the present request was withdrawn by operation of law pursuant to section 552.2615 of the Government Code. You argue that the city is not entitled to restate its previously withdrawn request, and as a result, the authority has no duty to respond to the city's current request. Second, you further inform us that upon receipt of the current request, the authority provided the city with a statement pursuant to section 552.232 that, because a portion of the requested information had previously been made available to the city, the authority will not again make the information available. *See* Gov't Code § 552.232. Thus, you contend that the request constitutes a repetitious request, to which the Act does not require the authority to respond. Third, and in the alternative, you argue that a portion of the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the

Government Code. We have considered your arguments and reviewed the submitted representative sample of information.¹

We first address the procedural issues you raise. You inform us that in response to the city's original request for the information at issue received by the authority on April 24, 2002, (the "April 24 request") the authority made over 1000 pages of information available to the city. You state that because the estimated cost of making copies exceeded \$40, the authority provided the city on May 8, 2002 with an itemized statement of the estimated copy charges as provided under section 552.2615 of the Government Code. You state that the May 8, 2002 letter also contained an offer to allow the city to inspect the compiled material without charge and to mark pages for copying. You state that the authority sought a ruling from this office with regard to that portion of the requested information not made available.

On June 7, 2002, the authority submitted a letter to this office in which it stated that the city did not respond to the authority's May 8, 2002 notice to the city under 552.2615, or to the authority's offer to make certain information available for inspection. Under section 552.2615, a request is considered to have been withdrawn by the requestor if the requestor does not respond in writing to a section 552.2615 itemized statement within ten days after the statement is sent to the requestor. Thus, this office ruled in Open Records Letter No. 02-3855 (2002) that the city's April 24 request was withdrawn by operation of law as provided by section 552.2615(b).

On July 22, 2002, the authority received from the city the current request for information which you assert seeks the identical information sought in the city's April 24 request. On August 5, 2002, the authority notified the city that, pursuant to section 552.232 of the Government Code, the authority would not make available the information previously made available to the city in response to the April 24 request. Section 552.232 provides in relevant part:

(a) A governmental body that determines that a requestor has made a request for information for which the governmental body has previously furnished copies to the requestor or made copies available to the requestor on payment of applicable charges under Subchapter F, shall respond to the request, in relation to the information for which copies have been already furnished or made available, in accordance with this section, . . .

....

¹We 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 (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.

(b) The governmental body shall certify to the requestor that copies of all or part of the requested information, as applicable, were previously furnished to the requestor or made available to the requestor on payment of applicable charges under Subchapter F. . . .

On this basis, we conclude that the authority, having made the certification required under section 552.232, need not provide the requestor with any of the information previously made available to the city in response to the city's April 24 request.

As for the remaining information, a representative sample of which you have submitted to this office for review, you argue that because the city failed to pursue the initial April 24 request, resulting in the request being withdrawn under section 552.2615, the city is not entitled to renew the withdrawn request. We disagree. Section 552.2615 contains no provisions barring a requestor from reasserting a request after that request has been withdrawn by operation of law under section 552.2615(b).² Therefore, we will address your arguments against disclosure of the information that you have submitted to our office for review.

First, we note that the information you have submitted as Exhibit 7 falls within the scope of section 552.022 of the Government Code. Section 552.022 provides in relevant part 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;

²We note, however, that, to section 552.263(c) of the Government Code provides that:

[a]n officer for public information or the officer's agent may require a deposit or bond for payment of unpaid amounts owing to the governmental body in relation to previous requests that the requestor has made under this chapter before preparing a copy of public information in response to a new request if those unpaid amounts exceed \$100. The officer for public information or the officer's agent may not seek payment of those unpaid amounts through any other means.

Gov't Code § 552.022(a)(1) (emphasis added). The authority must release any requested information that falls within section 552.022(a), unless that information is expressly confidential under other law or is part of a completed report, audit, evaluation, or investigation made of, for, or by a governmental body that is protected by section 552.108. You do not raise section 552.108. Sections 552.103, 552.105, and 552.111 of the Government Code, which you do raise, are discretionary exceptions to disclosure that protect the interests of the governmental body and may be waived. As such, these sections are not "other law" that makes information expressly confidential for purposes of section 552.022.

We note, however, that you also argue that the submitted information is excepted from disclosure under section 552.104 of the Government Code. Section 552.104(b) of the Government Code provides

[t]he requirement of Section 552.022 that a category of information listed under Section 552.022(a) is public information and not excepted from required disclosure under this chapter unless expressly confidential under law does not apply to information that is excepted from required disclosure under this section.

We will therefore address your section 552.104 argument for the information in Exhibits 6 and 7. Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104. The purpose of section 552.104 is to protect the government's interests when it is involved in certain commercial transactions. For example, section 552.104 is generally invoked to except information submitted to a governmental body as part of a bid or similar proposal. *See, e.g.*, Open Records Decision No. 463 (1987). In these situations, the exception protects the government's interests in obtaining the most favorable proposal terms possible by denying access to proposals prior to the award of a contract. When a governmental body seeks protection as a competitor, however, we have stated that it must be afforded the right to claim the "competitive advantage" aspect of section 552.104 if it meets two criteria. The governmental body must first demonstrate that it has specific marketplace interests. *See* Open Records Decision No. 593 at 4 (1991) (governmental body that has been granted specific authority to compete in the private marketplace may demonstrate marketplace interests analogous to those of a private entity). Second, the governmental body must demonstrate actual or potential harm to its interests in a particular competitive situation. A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. *Id.* at 2. Whether release of particular information would harm the legitimate marketplace interests of a governmental body requires a showing of the possibility of some specific harm in a particular competitive situation. *Id.* at 5, 10.

In this case, you argue that the authority faces competition in its efforts to purchase property for the Bayport Project. You state that "not only is the [authority] competing against the sellers who want a better price for their property, but it is also competing against other potential purchasers who also want the property that is the subject of the information the [authority] has withheld." We are unpersuaded, however, that the release of an appraisal

report dated December 12, 2000 would result in specific harm to the authority in its current efforts to purchase the subject property. Therefore, we find that the authority may not withhold the information in Exhibit 7 under section 552.104, and thus, it must be released to the requestor. We similarly find that you have not demonstrated how release of the Environmental Site Assessment submitted as Exhibit 6 would result in competitive harm to the authority. Accordingly, the information in Exhibit 6 must also be released to the requestor.

For the remainder of the submitted information not subject to section 552.022, we will address your argument under section 552.103 of the Government Code. Section 552.103(a) 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.

A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a two-prong showing that (1) litigation is pending or reasonably anticipated, 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 (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.); Open Records Decision No. 588 (1991). Further, litigation must be pending or reasonably anticipated on the date the requestor applies to the public information officer for access. Gov't Code § 552.103(c).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Nor does the mere fact that an individual hires an attorney and alleges damages serve to establish that litigation is reasonably anticipated. Open Records Decision No. 361 at 2 (1983). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

You cite various newspaper articles and letters which you state indicate that the city is planning to sue the authority. Moreover, you refer us to four prior rulings from this office in which we ruled that litigation was reasonably anticipated with respect to the Bayport Project, and state that "the evidence remains strong today that the [authority] reasonably anticipates litigation relating to the Bayport Project."³ Accordingly, we agree that you have shown that litigation is reasonably anticipated. *See* Open Records Decision No. 638 (1996). Furthermore, we find that the requested information relates to the anticipated litigation. Thus, the authority may withhold the information from disclosure under section 552.103.

Generally, however, once information has been obtained by all parties to the 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). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, 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).

To summarize, the authority may withhold the majority of the information submitted to this office as responsive to the request under section 552.103. The completed reports in Exhibits 6 and 7, however, must be released to the requestor.

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

³ These rulings, Open Records Letter Nos. 2002-3833 (2002), 2001-4914 (2001), 2000-1197 (2000), and 2000-3841 (2000), address requests for information related to the Bayport Project, a project undertaken by the authority "to plan, design, and construct a container terminal at the Bayport shipping channel."

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,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/jh

Ref: ID# 170456

Enc: Submitted documents

c: Mr. Bo McDaniel
City Manager
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(w/o enclosures)