



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

July 11, 2003

Mr. Warner F. Fassnidge
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR2003-4796

Dear Mr. Fassnidge:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 184220.

The City of San Antonio (the "city") received three requests from the same requestor for information relating to the Majestic Theater (the "Majestic") and the San Antonio Symphony (the "Symphony"). You state that you will release much of the requested information. You claim that a portion of the requested information is not subject to disclosure under the Public Information Act (the "Act"). In the alternative, you claim that this information as well as other records are excepted from disclosure under sections 552.104, 552.105, 552.106, 552.107, 552.110, and 552.111 of the Government Code. In addition, you have notified two third parties—The Foundation for Cultural arts in San Antonio d/b/a Las Casas ("Las Casas") and Arts Center Enterprises, Incorporated ("A.C.E.")—of the request and of their opportunity to submit comments to this office. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have considered all arguments and exceptions and reviewed the submitted information. We have also considered comments submitted by the requestor. *See* Gov't Code § 552.304 (providing for submission of public comments).

Initially, we address your contention that the requested sublease of the Majestic from Las Casas to A.C.E. and a portion of the requested information concerning the use of the Majestic by the Symphony are not public information and are therefore not subject to disclosure under the Act. *See* Gov't Code § 552.021 (indicating that Act is only applicable to "public information"). Section 552.002 defines public information as "information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business: (1) by a governmental body; or (2) for a governmental body

and the governmental body owns the information or has a right of access to it." Information that is collected, assembled, or maintained by a third party may be subject to disclosure under chapter 552 of the Government Code if it is maintained for a governmental body, the governmental body owns or has a right of access to the information, and the information pertains to the transaction of official business. *See* Open Records Decision No. 462 (1987).

You explain that, in 1988, the city purchased the Majestic and entered into a lease requiring Las Casas to restore the theater and allowing the company to use the theater. The parties also entered into a sublease or "Booking Lease," which leased the theater back to the city for 115 days. You inform us that the Symphony "has utilized the dates in the Majestic." Las Casas also has a management agreement or sublease with A.C.E. that provides for the presentation of performing art shows at the facility.

You have submitted as Volume 1 documents that you characterize as the sublease between Las Casas and A.C.E. and information concerning negotiations among Las Casas, A.C.E., and the Symphony intended to decrease costs and increase revenues in order to "provide for the Symphony's continued viability." You state that the city was not a party to either the sublease or the negotiations. You assert that the city "did not collect, assemble, or maintain under a law or ordinance or in the transaction of official business" the information submitted as Volume 1. You further contend that this information "would not be kept by the City in connection with the transaction of official business and the City does not own the information or have a right of access to it." Finally, you assert that the city "obtained a copy as a courtesy of the parties." Based on these representations, you assert that the information submitted as Volume 1 does not constitute "public information" and need not be released. You admit, however, that the city "maintained an interest" in the development of both the sublease and the negotiations. In addition, you state that "[f]ollowing execution of the 1988 Master Lease between the City and Las Casas, amendments to this management agreement [between Las Casas and A.C.E.] have required City approval." Because these documents pertain to property owned by the city and are maintained by the city, we conclude that Volume 1 constitutes "information that is collected, assembled, or maintained . . . in connection with the transaction of official business" by the city. Therefore, the documents are subject to the Act, and we will address the exceptions that you claim for them.

We understand you to assert that all of the submitted information is excepted from disclosure under section 552.105. This section excepts from disclosure information relating to:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Gov't Code § 552.105. Section 552.105 is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. *See* Open Records Decision Nos. 564 (1990), 357 (1982), 310 (1982). This office has held that section 552.105

applies to leases as well as purchases of real estate. *See* Open Records Decision No. 348 (1982). Information excepted from disclosure under section 552.105 that pertains to such negotiations may be excepted so long as the transaction relating to those negotiations is not complete. *See* Open Records Decision No. 310 (1982). A governmental body may withhold information "which, if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" Open Records Decision No. 357 at 3 (1982) (quoting Open Records Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiation position in regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body's good faith determination in this regard, unless the contrary is clearly shown as a matter of law. *See* Open Records Decision No. 564 (1990).

You indicate, and the documents reflect, that the submitted information relates to on-going renegotiations of a lease of real property. You further indicate that you believe release of this information would interfere with your planning or negotiation position regarding this transaction. Based on our review of your arguments and the submitted information, we find that section 552.105 is applicable in this instance. Accordingly, we conclude that the city may withhold the submitted information pursuant to section 552.105 of the Government Code. As we are able to make this determination, we need not address your other claimed exceptions or arguments submitted on behalf of the third parties.

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,

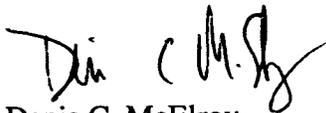
at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

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 Dep't of Pub. 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,



Denis C. McElroy
Assistant Attorney General
Open Records Division

DCM/sdk

Ref: ID# 184220

Enc. Submitted documents

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