



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

March 10, 2004

Ms. Rebecca Brewer  
Abernathy, Roeder, Boyd, & Joplin, P.C.  
P.O. Box 1210  
McKinney, Texas 75070-1210

OR2004-1812

Dear Ms. Brewer:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 197344.

The City of Royse City (the "city"), which you represent, received two requests from the same requestor. The first seeks information relating to the city's proposed home-rule election and certain territorial and water issues.<sup>1</sup> The second request asks for certain agendas, minutes, notices, resolutions, ordinances, orders, and drafts of a proposed city charter. You state that the city has "provided, or made available, resolutions, ordinances, minutes and notices of the City Charter Commission, City Council and any sub-group or committee of the City Council" in response to the second request. You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.106, and 552.111 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 for submission of public comments).

Initially, we note that some of the information you seek to withhold constitutes minutes and recordings of public meetings of a governmental body. The minutes, tape recordings, and agendas of a governmental body's public meetings are specifically made public by statute. *See Govt Code §§ 551.022* (minutes and tape recordings), *551.043* (notice). Information

---

<sup>1</sup>We note that the city asked for and received clarification regarding one of the categories of the first request. *See Gov't Code § 552.222(b)* (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); *see also* Open Records Decision No. 663 (1999) (discussing tolling of deadlines during period in which governmental body is awaiting clarification).

made public by statute may not be withheld from the public under any of the Public Information Act's (the "Act's") exceptions to public disclosure. *See, e.g.*, Open Records Decision Nos. 544 (1990), 378 (1983), 161 (1977), 146 (1976). Accordingly, the minutes and recordings of the public meetings, which we have marked, must be released in accordance with the Open Meetings Act. *See* Gov't Code § 551.022.

We turn now to your arguments for the remaining information, which is not made public by statute. Section 552.103 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). A government 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 is pending or reasonably anticipated on the date the government body receives the request for information, and (2) the information at issue is related to that litigation. *See Thomas v. Cornyn*, 71 S.W.3d 473, 487 (Tex. App.—Austin 2002, no pet.); *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (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). For purposes of section 552.103(a), this office considers a contested case under the Texas Administrative Procedure Act ("APA"), Government Code chapter 2001, to constitute "litigation." Open Records Decision No. 588.

In this instance, you inform us that the city is party to "a contested case regarding Royse City's requested amendment to its [Certificate of Convenience and Necessity from the Texas Commission on Environmental Quality]." Thus, we conclude that the city has shown that litigation, in the form of a contested case under the APA, was pending in this matter prior to the receipt of the present request for information. You explain that the city's decision to become a home-rule city will affect its annexation powers and its provision of water and sewer service to any additionally annexed areas. Based on your explanation and arguments, we find that you have demonstrated that the submitted information relates to the pending litigation for purposes of section 552.103(a). Therefore, the city may generally withhold the remaining submitted information pursuant to section 552.103.

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 to which all parties in the pending suit have had access 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).

In addition, we note that the submitted records indicate that a draft of the city's proposed charter may have been previously released to the public. Section 552.007 of the Government Code provides that if a governmental body voluntarily releases information to any member of the public, the governmental body may not withhold such information from further disclosure unless its public release is expressly prohibited by law. *See* Gov't Code 552.007; Open Records Decision No. 518 at 3 (1989). Section 552.103 is a discretionary exception that may be waived by a governmental body; this exception does not make information confidential. *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); *see also* Open Records Decision No. 522 at 4 (1989) (discretionary exceptions in general). Therefore, the city may withhold the proposed charter pursuant to section 552.103 only if it has not been previously released to a member the public. On the other hand, if the city has previously made a version of this charter available, that information must be released since the city does not cite and we are unaware of any law that makes this information confidential.<sup>2</sup>

In summary, the marked minutes and recordings of public meetings of a governmental body must be released under section 551.022 of the Government Code. Pursuant to section 552.103, the city may withhold the remaining submitted information unless all other parties to the pending proceeding have had access to it or the city has previously released the information to the public. As our ruling on these issues is dispositive, we need not address your remaining arguments.

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

---

<sup>2</sup>We note that the city has also raised section 552.101 as a possible exception to disclosure. However, it does not contend that the proposed city charter is information made confidential by law.

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).

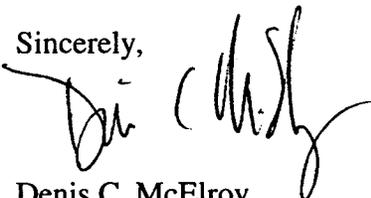
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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/lmt

Ref: ID# 197344

Enc. Submitted documents

c: Ms. Leah Curtis Morris  
Curtis, Alexander, McCampbell & Morris, P.C.  
P.O. Box 1256  
Greenville, Texas 75402-1256  
(w/o enclosures)