



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

August 25, 2004

Ms. Debra A. Drayovitch
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6000 Western Place, Suite 200
Fort Worth, Texas 76107

OR2004-7287

Dear Ms. Drayovitch:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 207918.

The City of Corinth (the "city"), which you represent, received three requests from the same requestor for information concerning a proposed apartment development, other apartment complexes constructed within the city, the parking requirements of the city's zoning ordinance, and the city's road construction standards, park dedication requirements, and street extension policies.¹ You indicate that a portion of the information requested in the third request does not exist. The Public Information Act (the "Act") does not require a governmental body to disclose information that did not exist at the time the request was received. *Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986). You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

As a preliminary matter, we must address the city's obligations under section 552.301 of the Government Code. Pursuant to section 552.301(b), a governmental body that receives a

¹ The present ruling addresses requests received by the city on June 9, June 17, and June 22, 2004.

² We 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.

request for information that it wishes to withhold pursuant to one of the Act's exceptions must ask for a decision from the attorney general and state the exceptions that apply within ten business days of the date of receiving the request. *See* Gov't Code § 552.301(a), (b). In this case, we note the city did not raise section 552.111 as an exception to disclosure within ten business days of the date the city received the first request. Consequently, we determine the city has failed to comply with the procedural requirements of section 552.301 with respect to the city's claim under section 552.111. Section 552.111 is a discretionary exception to disclosure that protects the governmental body's interests and may be waived by the governmental body's failure to comply with section 552.301. *See* Open Records Decision No. 473 (1987) (governmental body may waive statutory predecessor to section 552.111); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Accordingly, we find the city has waived its claim under section 552.111 in this instance and we determine that none of the submitted information may be withheld pursuant to section 552.111. We will, however, address the applicability of the remaining exceptions, which were timely raised by the city.

As a second threshold matter, we note your claim that "newspaper articles regarding [the city] from 1990 to the present" requested in the second request are commercially available and, pursuant to section 552.027 of the Government Code, are therefore not required to be disclosed by the city. Section 552.027 provides:

- (a) A governmental body is not required under this chapter to allow the inspection of or to provide a copy of information in a commercial book or publication purchased or acquired by the governmental body for research purposes if the book or publication is commercially available to the public.
- (b) Although information in a book or publication may be made available to the public as a resource material, such as a library book, a governmental body is not required to make a copy of the information in response to a request for public information.
- (c) A governmental body shall allow the inspection of information in a book or publication that is made part of, incorporated into, or referred to in a rule or policy of a governmental body.

Gov't Code § 552.027. Section 552.027 is designed to alleviate the burden of providing copies of commercially available books, publications, and resource materials maintained by a governmental body, such as telephone directories, dictionaries, encyclopedias, statutes, and periodicals. Therefore, section 552.027 provides exemptions from the definition of "public information" under section 552.002 for commercially available research material. *See* Gov't Code § 552.002 (defining "public information"). However, while the city does not have to provide copies of a newspaper, section 552.027 is not applicable to copies of news articles extracted from newspapers maintained by the city. Accordingly, any copies of news articles

extracted from newspapers and maintained by the city that are responsive to the present request must be released unless subject to an exception under the Act.

Next, we also note that the submitted documents include public notices and copies of minutes of public meetings of city boards and commissions. The minutes, tape recordings, and agendas of a governmental body's public meetings are specifically made public under the Open Meetings Act, chapter 551 of the Government Code. *See* Gov't Code §§ 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying upon request), 551.043 (notice of meeting of governmental body must be posted in a place readily accessible to general public at least 72 hours before scheduled time of meeting), 551.050 (municipal governmental body required to post notice of meeting at a place convenient to the public in the city hall); *see also* Gov't Code § 552.022(a)(15) (information regarded as open to the public is not excepted from disclosure under Act unless expressly confidential by law). Information made public by statute may not be withheld from the public under any of the Act's exceptions to public disclosure. *See, e.g.*, Open Records Decision Nos. 544 (1990), 378 (1983), 161 (1977), 146 (1976). Accordingly, the city must release the public notices and minutes we have marked in accordance with the Open Meetings Act. *See* Gov't Code § 551.022.

The submitted documents also contain information that is subject to section 552.022 of the Government Code, which provides in pertinent part:

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 submitted documents include a completed report made by or for the city that is subject to section 552.022(a)(1), as well as copies of checks relating to the receipt of public funds by the city that are subject to section 552.022(a)(3). This information, which we have marked, must be released unless it is confidential under other law. You contend that this information is excepted from disclosure under section 552.103 of the Government Code; we note that section 552.103 is also a discretionary exception that protects the governmental body's interests and is therefore not other law that makes

information expressly confidential for purposes of section 552.022(a).³ *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. 665 at 2 n.5 (2000). Thus, the city may not withhold the completed report and copies of checks we have marked pursuant to section 552.103.

We note that the copies of checks in the submitted documents include account number information that is excepted from disclosure under section 552.136 of the Government Code, which provides in relevant part:

(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. We have marked the account number information that the city must withhold pursuant to section 552.136 of the Government Code.

We now turn to your claimed exceptions to disclosure for the remaining submitted information. As you contend that the submitted information is excepted in its entirety under section 552.103 of the Government Code, we begin by addressing your claim under section 552.103. 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.

....

³ We note that the city does not seek to withhold this information under sections 552.101 or 552.107 of the Government Code.

(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 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. *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, 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 section 552.103(a).

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.⁴ 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). Further, the fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983).

In this case, you provide documentation showing that prior to the present requests, the developer of the project at issue sent letters informing the city of the developer's intent to sue if the city failed to grant certain variances and approve permits that would allow the development to proceed. Based on your representations and our review of the submitted information, we find the city has established that it reasonably anticipated litigation prior to the dates the city received the present requests. Furthermore, we agree that the submitted

⁴In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); 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 threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

information is related to the anticipated litigation. We therefore find that the city has established that section 552.103 is applicable in this instance.

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). Thus, information that has either been obtained from or provided to the opposing party in the lawsuit at issue 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 this case, it is clear that the opposing party in the litigation at issue has seen or obtained some of the submitted documents. This information is not excepted from disclosure under section 552.103 and may not be withheld on that basis. We note that the city has not raised any other exceptions to disclosure for the portion of the submitted documents that includes information seen or obtained by the opposing party. We therefore determine the city must release information in the submitted documents that has been seen or obtained by the opposing party in the litigation at issue to the requestor. We further determine, however, that the remaining submitted information is excepted from disclosure at this time pursuant to section 552.103 of the Government Code and may be withheld.

In summary, any copies of news articles extracted from newspapers and maintained by the city that are responsive to the present request must be released. The city must release the public notices and minutes of public meetings we have marked in the submitted documents pursuant to the Open Meetings Act. We have also marked information in the submitted documents that the city must generally release pursuant to section 552.022 of the Government Code, but we have marked account number information in these documents that the city must withhold pursuant to section 552.136 of the Government Code. With the exception of information that has been seen or obtained by the opposing party in the litigation at issue, we conclude the city may withhold the remaining submitted information under section 552.103 of the Government Code. Based on this finding, we need not reach your remaining claimed exceptions to disclosure.

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 thirty calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within ten 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 ten 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 ten 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); *Tex. 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 ten calendar days of the date of this ruling.

Sincerely,



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Assistant Attorney General
Open Records Division

DRS/seg

Ref: ID# 207918

Enc: Submitted documents

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