



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 28, 2006

Mr. Kyle G. Thomas
Senior Assistant City Attorney
City of Beaumont
P.O. Box 3827
Beaumont, Texas 77704-3827

OR2006-15126

Dear Mr. Thomas:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 268000.

The City of Beaumont (the "city") received two requests from the same requestor for (1) information referencing property at a specific address prepared during a specified time interval and (2) a videotape of an April 25, 2006 city council meeting. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and have reviewed the information you submitted.

We first note that the submitted information includes a city ordinance. In Open Records Decision No. 551 (1990), this office considered whether a city ordinance could be withheld from the public under the Act, stating:

It is difficult to conceive of a more open record. The law, binding upon every citizen, is free for publication to all. *Banks v. Manchester*, 128 U.S. 244, 253 (1888). This policy is based on the concept of due process which requires that the people have notice of the law. *Building Officials & Code Admin. v. Code Technology, Inc.*, 628 F.2d 730, 734 (1st Cir. 1980). Given this constitutional consideration, it is difficult to hypothesize a circumstance that would bring a law or ordinance within an exception to public disclosure.

Accordingly, the city ordinance that we have marked may not be withheld under section 552.103 of the Government Code and must be released to the requestor.

The submitted information also includes a videotape of a city council meeting. Section 551.022 of the Open Meetings Act, chapter 551 of the Government Code, provides that the “minutes and tape recordings of an open meeting are public records and shall be available for public inspection and copying on request to the governmental body’s chief administrative officer or the officer’s designee.” Gov’t Code § 551.022. Information that is specifically made public by statute may not be withheld from the public under any of the exceptions to public disclosure under the Act. *See, e.g.*, Open Records Decision Nos. 544 (1990), 378 (1983), 161 (1977), 146 (1976). Therefore, the videotape of the city council meeting must be released pursuant to section 551.022.

We next note that some of the remaining information is subject to section 552.022 of the Government Code. Section 552.022 provides that “[w]ithout limiting the amount or kind of information that is public information under [the Act], the following categories of information are public information and not excepted from required disclosure under [the Act] 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; [and]

...

(15) information regarded as open to the public under an agency’s policies[.]

Gov’t Code § 552.022(a)(1), (15). The submitted documents include completed reports that must be released under section 552.022(a)(1), unless they contain information that is excepted from disclosure under section 552.108 of the Government Code or expressly confidential under other law. The documents at issue also include a previously published legal notice that must be released under section 552.022(a)(15), unless it contains information that is expressly confidential under other law. Although the city seeks to withhold the submitted information under section 552.103, that section is a discretionary exception to disclosure that protects a governmental body’s interests and may be waived. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.—Dallas 1999, no pet.) (Gov’t Code § 552.103 may be waived); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 is not other law that makes information confidential for the purposes of section 552.022. Therefore, the city may not withhold any of the information that is subject to section 552.022 under section 552.103. As you claim no other exception to the disclosure of that information, which we have marked, it must be released to the requestor.

With respect to the remaining information, we address your claim under section 552.103, which 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 governmental body that claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date of its receipt of the request for information and (2) the information at issue is related to the pending or anticipated litigation. *See Univ. of Tex. Law Sch. v. Tex. 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.). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See Open Records Decision No. 551 at 4 (1990).*

You assert that the submitted information is related to an action for an injunction and a temporary restraining order that was filed on the date of the city's receipt of this request for information. You explain that the matter is now on appeal. You have provided copies of the petition and the notice of appeal. Based on your representations and the submitted pleadings, we conclude that the city was a party to pending litigation when it received this request for information. We also conclude that the remaining information is related to the pending litigation. Therefore, section 552.103 is applicable in this instance.

We note, however, that the opposing party in the litigation already has seen or had access to some of the remaining information. The purpose of section 552.103 is to enable a governmental body to protect its position in litigation by forcing parties to obtain information that is related to litigation through discovery procedures. *See Open Records Decision No. 551 at 4-5 (1990).* If the opposing party has seen or had access to information that is related to litigation, through discovery or otherwise, then there is no interest in withholding such information from public disclosure under section 552.103. *See Open Records Decision Nos. 349 (1982), 320 (1982).* Therefore, to the extent that the opposing party in the pending

litigation has seen or had access to the remaining information, such information is not excepted from disclosure under section 552.103 and must be released. With the exception of such information, the city may withhold the remaining information at this time under section 552.103. We note that the applicability of section 552.103 ends once the related litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary: (1) the city must release the marked ordinance; (2) the videotape of the city council meeting must be released pursuant to section 551.022 of the Government Code; (3) the marked information that is subject to section 552.022 of the Government Code must be released; and (4) except for the information that the opposing party in the pending litigation has seen or to which he has already had access, the city may withhold the rest of the submitted information at this time under section 552.103 of the Government Code.

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.

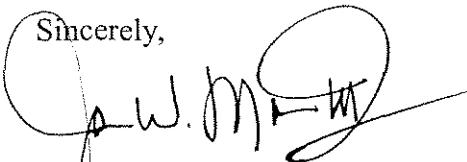
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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 Office of the Attorney General 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. 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,


James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/jww

Ref: ID# 268000

Enc: Submitted documents

c: Ms. Susan J. Oliver
2495 Broadway
Beaumont, Texas 77702
(w/o enclosures)