



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 5, 2008

Mr. Robert E. Hager
Nichols, Jackson, Dillard, Hager & Smith, L.L.P.
1800 Lincoln Plaza
500 North Akard
Dallas, Texas 75201

OR2008-12225

Dear Mr. Hager:

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# 321106.

The City of Lancaster (the "city"), which you represent, received a request for information relating to the local airport, including (1) records of payments received by the city during a specified time interval; (2) the names of persons who deposited checks; and (3) a customer list and any other data merged or taken from information belonging to Lancaster Airport, Inc. and the names of persons responsible. 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 some of the submitted information does not fall within the time interval specified by the requestor. That information, which we have marked, is not responsive to this request. This decision does not address the public availability of the non-responsive information, and that information need not be released.

We also note that you have not submitted any information relating to the names of persons who deposited checks. You state that the city uses a private courier service to make deposits. We understand you to contend that information relating to the courier service is not subject to the Act. We note that the Act is applicable to "public information," as defined by section 552.002 of the Government Code. Section 552.002(a) provides that "public information" consists of

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.

Gov't Code § 552.002(a). Thus, all of the information in a governmental body's physical possession generally constitutes public information that is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). The Act also encompasses information that a governmental body does not physically possess, if the information is collected, assembled, or maintained for the governmental body, and the governmental body owns the information or has a right of access to it. Gov't Code § 552.002(a)(2); *see* Open Records Decision No. 462 at 4 (1987). Based on your representation that the city uses the courier service to make bank deposits, we find that information concerning the courier service is related to the transaction of official city business. *See* Gov't Code § 552.022(a); *see also* Open Records Decision No. 518 at 3 (1989) (if governmental entity employs agent to carry out task that entity itself would otherwise have performed, information relating to that task that agent has assembled or maintains is subject to Act). Thus, to the extent that information concerning the courier service is maintained by the city, or maintained for the city, and the city has a right of access to it, such information falls within the scope of section 552.002(a) and is subject to the Act. Therefore, the city must release any such information that is responsive to this request, unless the information falls within the scope of an exception to disclosure. *See* Gov't Code § 552.021. Because you do not claim an exception to the disclosure of responsive information concerning the courier service, any such information that is maintained by or for the city must be released. *See id.* §§ 552.301(a), .302.

We next note that most of the submitted information falls within the scope of section 552.022(a)(3) of the Government Code. Section 552.022(a)(3) provides for required disclosure of "information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]" unless the information is expressly confidential under other law. *Id.* § 552.022(a)(3). Thus, the city must release the submitted list of payments pursuant to section 552.022(a)(3), unless that information is expressly confidential under other law. Although you seek to withhold the list of payments under section 552.103 of the Government Code, 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.) (governmental body may waive Gov't Code § 552.103); 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(a)(3). Therefore, the submitted list of payments may not be withheld under

section 552.103. Instead, the city must release that information, which we have marked, pursuant to section 552.022(a)(3).

With respect to the rest of the submitted information, we address your claim under section 552.103. That exception 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 seeks to withhold information under section 552.103 must provide relevant facts and documentation sufficient to establish the applicability of the exception to the information at issue. 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 state that the remaining information is related to a lawsuit styled *Clinton T. Pye et al. v. City of Lancaster, Texas, et al.*, Cause No. DC-0800735-C, 68th Judicial District Court, Dallas County. You have submitted documentation indicating that the lawsuit was pending when the city received this request for information. Based on your representations, the submitted documentation, and our review of the information at issue, we conclude that the city may withhold the remaining information, which we have marked, under section 552.103.

In reaching this conclusion with respect to the remaining information, we assume that the opposing parties in the pending litigation have not seen or had access to that 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 relating to litigation through discovery procedures. *See ORD 551 at 4-5.* If the opposing parties have seen or had access to information relating 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). We also note that the applicability of section 552.103 ends when the related litigation concludes. *See* Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary: (1) the city must release any responsive information concerning the courier service that is maintained by the city, or maintained for the city, and the city has a right of access to it; (2) the city also must release the marked list of payments pursuant to section 552.022(a)(3) of the Government Code; and (3) the city may withhold the remaining information 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 file suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such a challenge, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3). If the governmental body does not file suit over 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).

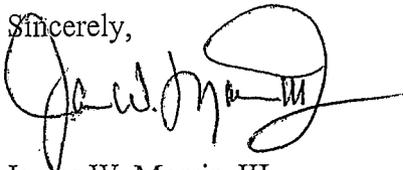
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can challenge that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,

A handwritten signature in black ink, appearing to read "James W. Morris, III". The signature is fluid and cursive, with a large initial "J" and "M".

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

JWM/jh

Ref: ID# 321106

Enc: Submitted documents

c: Mr. Clinton T. Pye
716 Lake Carolyn #121W
Las Colinas, Texas 75039
(w/o enclosures)