



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 19, 2009

Mr. Robert R. Wood, Jr.  
Legal Counsel  
Barnett Gathering, LP  
810 Houston Street  
Fort Worth, Texas 76102

OR2009-02203

Dear Mr. Wood:

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# 335325.

Barnett Gathering, LP ("Barnett Gathering") received a request for forty-one categories of information pertaining to three specified properties. You state that Barnett Gathering has no information responsive to part five of the request.<sup>1</sup> You claim that the remaining requested information is exempted from disclosure under sections 552.103 and 552.107 of the Government Code. We also understand you to raise sections 552.110 and 552.111 of the Government Code for portions of the requested information. We have considered the exceptions you claim and reviewed the submitted representative sample of information.<sup>2</sup> We have also received and considered comments submitted by the requestor. *See Gov't Code*

---

<sup>1</sup>We note that the Act does not require a governmental body to release information that did not exist when it received a request or create responsive information. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 555 at 1 (1990), 452 at 3 (1986), 362 at 2 (1983).

<sup>2</sup>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.

§ 552.304 (interested party may submit written comments regarding availability of requested information).

Initially, we address the requestor's contention that Barnett Gathering did not comply with the procedural requirements of the Act in requesting our decision. The requestor asserts that Barnett Gathering failed to comply with subsection 552.301(e)(2) of the Government Code, which states a governmental body must label the copy of the information at issue to indicate which exceptions under the Act apply to which parts of the copy. *Id.* § 552.301(e)(2). Upon review, we find that Barnett Gathering sufficiently identified which of the claimed exceptions apply to each portion of the submitted information. Thus, we conclude that Barnett Gathering fully complied with the requirements of section 552.301 in requesting this decision.

Barnett Gathering asserts that the request seeks, in part, information that is not subject to the Act. Section 552.0037 of the Government Code provides:

Notwithstanding any other law, information collected, assembled, or maintained by an entity that is not a governmental body but is authorized by law to take private property through the use of eminent domain is subject to this chapter in the same manner as information collected, assembled, or maintained by a governmental body, but only if the information is related to the taking of private property by the entity through the use of eminent domain.

Gov't Code § 552.0037. Under section 552.0037, information related to the taking of private property through the use of eminent domain by an entity that is not a governmental body is subject to the Act. You acknowledge that Barnett Gathering, a non-governmental body, is authorized by law to take private property through the use of eminent domain. *See* Util. Code § 181.004. However, you assert that portions of the requested information are not related to Barnett Gathering's taking of private property through the use of eminent domain, and, thus, are not subject to the Act. Conversely, the requestor argues that all of the requested information relates to Barnett Gathering's taking of private property through eminent domain. In this instance, we will defer to Barnett Gathering's interpretation of section 552.0037 and its applicability to the requested information. *Cf.* Open Records Decision No. 561 (1990) at 7 (governmental body must make a good faith effort to relate a request to information held by it). Accordingly, we accept Barnett Gathering's representation that it has submitted representative samples of the requested information related to its use of eminent domain, and, therefore, subject to the Act.

Next, we note that section 552.022 of the Government Code is applicable to some of the submitted information. Section 552.022 (a)(1) provides for required public disclosure of "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body[.]" unless the information is expressly confidential under other law or excepted from

disclosure under section 552.108 of the Government Code. Gov't Code § 552.022 (a)(1). Section 552.022(a)(17) provides for required public disclosure of "information that is also contained in a public court record," unless the information is expressly confidential under other law. *Id.* § 552.022(a)(17). In this instance, the submitted information contains an appraisal subject to section 552.022(a)(1) and court-filed documents subject to section 552.022(a)(17). We have marked the information that is subject to section 552.022. You claim the information at issue is excepted from disclosure under sections 552.103 and 552.107 of the Government Code. However, these sections are discretionary exceptions that protect a governmental body's interests and are, therefore, not "other law" for purposes of section 552.022. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 69, 475-76 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision Nos. 676 at 10-11 (2002) (attorney-client privilege under section 552.107(1) may be waived); 665 at 2 n.5 (2000) (discretionary exceptions generally). Therefore, Barnett Gathering may not withhold the information at issue under either section 552.103 or section 552.107 of the Government Code. As you raise no other exceptions to disclosure for this information, the information subject to 552.022, which we have marked, must be released to the requestor.

You claim that the remaining information is excepted from disclosure under section 552.103 of the Government Code, which 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.

...

(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). Barnett Gathering 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 governmental body received the request, 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). Barnett Gathering must meet both prongs of this test for information to be excepted under 552.103(a).

You state, and provide documentation showing, that the submitted information is related to three condemnation lawsuits which were initiated on September 25, 2008, prior to Barnett Gathering's receipt of the instant request, and are currently pending in the County Courts at Law for Ellis County, styled *Barnett Gathering LP v. BP 388 Grand Prairie, Ltd. and Stillwater National Bank and Trust Company*, Cause Nos. 08-C-3839, 08-C-3840, and 08-C-3841. You explain that the litigation is related to Barnett Gathering's exercise of its eminent domain power in relation to three specified properties, which are the subjects of the requested information. Based on your arguments and our review of the information at issue, we find that litigation is currently pending and that the submitted information is related to that litigation. As such, we conclude Barnett Gathering may generally withhold the remaining information under section 552.103 of the Government Code.

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). We note that the opposing party has previously had access to portions of the information at issue. Accordingly, while most of the remaining information may be withheld under section 552.103, any information that has been previously seen by the opposing party may not be withheld under this exception.<sup>3</sup> 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 summary, with the exception of the information we have marked under section 552.022, Barnett Gathering may generally withhold the submitted information under section 552.103 of the Government Code; however, any information that has been previously seen by an opposing party may not be withheld under this exception and must be released to the requestor.

This letter ruling is limited to the particular information 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 information or any other circumstances.

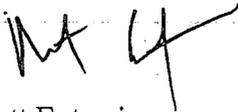
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public

---

<sup>3</sup>As our ruling is dispositive, we need not address your remaining arguments against disclosure.

information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General at (512) 475-2497.

Sincerely,

A handwritten signature in black ink, appearing to read 'M E', with a long horizontal stroke extending to the right.

Matt Entsminger  
Assistant Attorney General  
Open Records Division

MRE/eeg

Ref: ID# 335325

Enc. Submitted documents

cc: Requestor  
(w/o enclosures)