



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 23, 2009

Ms. Michelle Weiser
Schneider, Krugler, Kleinschmidt & Weiser, P.C.
P.O. Box 507
Giddings, Texas 78942

OR2009-10262

Dear Ms. Weiser:

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# 350108.

The City of Giddings (the "city"), which you represent, received a request for information pertaining to an accident at the city's Water Tank 4. You claim that the submitted information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted information.

Initially, you acknowledge that some of the information at issue was the subject of a previous request received by the city, in response to which this office issued Open Records Letter No. 2009-08086 (2009). In that ruling, we concluded that the city must withhold certain information under section 552.130 of the Government Code, but the remaining information was subject to section 552.022(a)(1) and must be released. As we have no indication that there has been any change in the law, facts, or circumstances on which the previous ruling was based, to the extent the submitted information was ruled upon in Open Records Letter No. 2009-08086, the city must rely on that ruling as a previous determination and continue to withhold or release this information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or

is not excepted from disclosure). To the extent the submitted information is not subject to the previous determination, we will consider your argument against disclosure.

Next, we note some of the remaining information is also subject to section 552.022(a)(1) of the Government Code, which provides:

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[.]

Gov't Code § 552.022(a)(1). The documents we marked consist of completed operating and lab analysis reports made for or by the city. Thus, the city may only withhold this information if it is excepted from disclosure under section 552.108 or expressly confidential under other law. Although you assert this information is excepted under section 552.103 of the Government Code, this section is a discretionary exception to public 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 section 552.103); Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 542 at 4 (1990) (statutory predecessor to section 552.103 may be waived). As such, section 552.103 is not "other law" that makes information confidential for purposes of section 552.022. Therefore, the completed operating and lab analysis reports we marked may not be withheld under section 552.103 of the Government Code.

We now address your arguments under section 552.103 of the Government Code for the remaining information. Section 552.103 provides in relevant part 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). 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* Open Records Decision No. 551 at 4-5 (1990). 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 that the governmental body received the request for information, and (2) the information at issue is related to that litigation. *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, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); ORD 551 at 4. A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You inform this office, and provide documentation showing, that prior to receiving this request the city was sued, and that this lawsuit regards the explosion of the city's Water Tank 4 on November 20, 2008. You also state the requested records relate to this pending litigation. Based on your representations and our review, we agree litigation was pending as of the date the request was received. We also find that the submitted information relates to this pending litigation. Therefore, we conclude the city may withhold the remaining information under section 552.103 of the Government Code.

In reaching this conclusion, however, we assume the opposing parties to the litigation have not previously had access to these records. 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. 551 at 2 (1990), 349 at 2 (1982), 320 at 1 (1982). Further, the applicability of section 552.103(a) ends once the litigation has been concluded. ORD 551 at 2 (1991); Attorney General Opinion MW-575 (1982).

In summary, the city must rely on Open Records Letter No. 2009-08086 as a previous determination and withhold or release the submitted information in accordance with that ruling. With the exception of the information we marked as subject to section 552.022(a)(1) of the Government Code which must be released, the city may withhold the remaining submitted information under section 552.103 of the Government Code.

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, 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 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 "Bob Davis", with a long horizontal flourish extending to the right.

Bob Davis
Assistant Attorney General
Open Records Division

RSD/cc

Ref: ID# 350108

Enc. Submitted documents

cc: Requestor
(w/o enclosures)