



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

October 20, 2009

Mr. Douglas L. Hibbard
Bracewell & Giuliani
711 Louisiana Street, Suite 2300
Houston, Texas 77002-2770

OR2009-14832

Dear Mr. Hibbard:

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# 358968.

The Magnolia Volunteer Fire Department (the "department"), which you represent, received eight requests from three requestors for (1) information pertaining to the alleged misuse of fuel; (2) communications between specified individuals concerning one of the requestors during a specified time period; and (3) information pertaining to fuel purchases during specified time periods. You state that the department has no information responsive to request item number two.¹ You claim that the remaining requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claim and reviewed the submitted representative sample of information.²

¹The Act does not require a governmental body to release information that did not exist when a request for information was received or to prepare new information in response to a request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983).

²We 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.

Initially, we note you have redacted information from the submitted documents. You do not assert, nor does our review of our records indicate, that you have been authorized to withhold any of the redacted information without seeking a ruling from this office. See Gov't Code § 552.301(a); Open Records Decision No. 673 (2000). Because we can discern the nature of the information that has been redacted, being deprived of this information does not inhibit our ability to make a ruling in this instance. Nevertheless, be advised that a failure to provide this office with requested information generally deprives us of the ability to determine whether information may be withheld and leaves this office with no alternative other than ordering that the redacted information be released. See Gov't Code §§ 552.301(e)(1)(D) (governmental body must provide this office with copy of "specific information requested" or representative sample), .302.

Next, we note that the information in Exhibit B is made expressly public under section 552.022 of the Government Code, which provides, in relevant part, as follows:

(a) Without limiting the amount or kind of information that is public information under this chapter, 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:

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Id. § 552.022(a)(3). In this instance, Exhibit B consists of invoices and statements regarding department fuel purchases and is, thus, subject to section 552.022(a)(3). Although you assert this information is excepted under section 552.103 of the Government Code, section 552.103 is a discretionary exception within the Act and not "other law" that makes information confidential. See *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); 665 at 2 n. 5 (2000) (discretionary exceptions generally). Therefore, the information in Exhibit B may not be withheld under section 552.103. However, we note some of the information in Exhibit B may be protected under section 552.136 of the Government Code.³ Because section 552.136 is other law for purposes of section 552.022, we will address this exception to disclosure. We will also address your argument under section 552.103 for the information in Exhibit C.

Section 552.136 of the Government Code states "[n]otwithstanding 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

³The Office of the Attorney General will raise a mandatory exception on behalf of a governmental body, but ordinarily will not raise other exceptions. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

§ 552.136(b). Accordingly, the department must withhold the account numbers we have marked in Exhibit B under section 552.136 of the Government Code. As you claim no other exceptions to disclosure for the remaining information in Exhibit B, this information must be released to the requestor who requested the information in Exhibit B.

We now address your argument under section 552.103 of the Government Code for the information in Exhibit C. Section 552.103 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). The department 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 department 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). The department must meet both prongs of this test for information to be excepted under section 552.103(a).

You state, and provide documentation showing, that prior to the department's receipt of the present requests for information, the department's chief filed a lawsuit against one of the requestors. You state that "[t]he facts and issues in the lawsuit arise directly as a consequence of [the chief]'s public office." Based on your representations and our review of the submitted information, we conclude that litigation was pending when the department received the present request. We also agree that the submitted information is related to the litigation for purposes of section 552.103. Therefore, the department may withhold the information in Exhibit C under section 552.103 of the Government Code.

We note, however, that once information has been obtained by all parties to the pending 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 pending litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends when the litigation has concluded or is no longer reasonably anticipated. Attorney General Opinion MW-575 at 2 (1982); Open Records Decision Nos. 350 at 3 (1982), 349 at 2 (1982).

In summary, the department must withhold the account numbers we have marked in Exhibit B under section 552.136 of the Government Code and may withhold the information in Exhibit C under section 552.103 of the Government Code. The remaining information in Exhibit B must be released to the requestor who requested that information.

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, toll free, at (888) 672-6787.

Sincerely,



Christopher D. Sterner
Assistant Attorney General
Open Records Division

CDSA/eeg

Ref: ID# 358968

Enc. Submitted documents

c: Requestor (3)
(w/o enclosures)