



ATTORNEY GENERAL OF TEXAS
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July 15, 2014

Mr. Gary B. Lawson
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OR2014-12158

Dear Mr. Lawson:

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# 529037 (ORR "Wu/SMBC Request").

The Dallas Police and Fire Pension System (the "system"), which you represent, received a request for all e-mails between a named individual and employees, officials, or representatives of Sumitomo Mitsui Banking Corporation ("Sumitomo"). You indicate the system has released some of the requested information. You claim the submitted information is excepted from disclosure under sections 552.103, 552.104, 552.105, and 552.143 of the Government Code. Additionally, you state release of the submitted information may implicate the proprietary interests of Sumitomo. Accordingly, you state, and provide documentation showing, you notified Museum Tower, L.L.C. ("Museum Tower"); Red Consolidated Holdings, L.L.C. ("Red Consolidated"); and Sumitomo of the request for information and of the right of each to submit arguments to this office as to why the submitted information should not be released. *See Gov't Code § 552.305(d); see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have received comments from Museum Tower, Red, and Sumitomo. We have reviewed the submitted information and the submitted arguments.

Initially, we note the requestor excludes account numbers, routing numbers, and American Bankers Association numbers from the scope of the request. Accordingly, these types of information are not responsive to the request for information. This ruling does not address the public availability of any information that is not responsive to the request and the system is not required to release that information in response to the request.

Next, we note some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022(a) provides, in relevant part:

(a) [T]he following categories of information are public information and not excepted from required disclosure unless made confidential under this chapter or 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]

...

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

Gov't Code § 552.022(a)(1), (3). The submitted information includes a completed report that is subject to subsection 552.022(a)(1). The system must release the completed report pursuant to subsection 552.022(a)(1) unless it is excepted from disclosure under section 552.108 of the Government Code or is made confidential under the Act or other law. *See id.* § 552.022(a)(1). The submitted information also contains information in an account, voucher, or contract relating to the receipt or expenditure of funds by the system that is subject to subsection 552.022(a)(3). The system must release this information unless it is made confidential under the Act or other law. *See id.* § 552.022(a)(3). You seek to withhold the information subject to section 552.022 under sections 552.103 and 552.105 of the Government Code. However, sections 552.103 and 552.105 are discretionary exceptions and do not make information confidential under the Act. *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 Gov't Code § 552.103); *see also* Open Records Decision Nos. 665 at 2 n.5 (2000) (discretionary exceptions generally), 663 at 5 (1999) (waiver of discretionary exceptions), 564 (1990) (statutory predecessor to section 552.105 subject to waiver). Therefore, the information subject to section 552.022 may not be withheld under section 552.103 or section 552.105 of the Government Code. However, the system also claims section 552.104 of the Government Code for this information. Information subject to section 552.022 may be withheld under section 552.104. *See* Gov't Code § 552.104(b) (information protected by section 552.104 not subject to required public disclosure under

section 552.022(a)). Further, sections 552.110 and 552.143 of the Government Code make information confidential under the Act. Accordingly, we will consider your arguments under sections 552.104 and 552.143 and Sumitomo's argument under section 552.110 for the information subject to section 552.022. We will also consider your arguments under sections 552.103 and 552.105 for the information not subject to section 552.022.

We first address your claim under section 552.103 of the Government Code for the information not subject to under section 552.022 of the Government Code. 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.

Id. § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show 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 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, orig. proceeding); *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 governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a).

The question of whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). To demonstrate litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.* Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, an attorney for a potential opposing party making a demand for payment and asserting an intent to sue if such payments are not made. Open Records Decision Nos. 555 at 3 (1990), 346 (1982). In addition, this office has concluded litigation was reasonably anticipated when the potential opposing party threatened to sue on several

occasions and hired an attorney. *See* Open Records Decision No. 288 at 2 (1981). However, an individual publicly threatening to bring suit against a governmental body, but who does not actually take objective steps toward filing suit, is not concrete evidence that litigation is reasonably anticipated. *See* Open Records Decision No. 331 at 1-2 (1982).

You contend the system reasonably anticipates litigation because it is currently in a dispute with the Nasher Sculpture Center (the "Nasher"). You explain the Nasher has made allegations that glare emanating from the glass walls of the Museum Tower building, a high-rise residential condominium owned by the system, is damaging the Nasher's art and vegetation and creating an unpleasant experience for visitors. You state representatives of Museum Tower and the Nasher have unsuccessfully participated in mediation efforts. You indicate all efforts short of litigation to resolve the dispute have failed and state the system anticipates being a party to any suit regarding the Museum Tower building. You argue there would be legal and financial recourse against the system as a result of any suit. Based on your representations and our review, we agree the system reasonably anticipated litigation on the date it received the request for information. You also state the information at issue is related to the anticipated litigation. Upon review, we agree most of the information not subject to section 552.022 of the Government Code is related to litigation the system anticipated on the date it received the request for information.¹ Thus, the system may withhold this information, which we have marked, under section 552.103 of the Government Code.¹ However, we find you have failed to demonstrate how the remaining information at issue is related to the anticipated litigation for purposes of section 552.103. Accordingly, the system may not withhold the remaining information at issue under section 552.103 of the Government Code.

Once the information at issue has been obtained by all parties to the anticipated litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to the information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Further, the applicability of section 552.103(a) ends once the litigation has concluded or is no longer reasonably anticipated. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

You claim the remaining information, including the information subject to section 552.022 of the Government Code, is protected by section 552.143 of the Government Code. Section 552.143 provides, in part,

(c) All information regarding a governmental body's direct purchase, holding, or disposal of restricted securities that is not listed in Section 552.0225(b)(2)-(9), (11), (13)-(16) is confidential and excepted from the requirements of Section 552.021. This subsection does not apply to a

¹As our ruling is dispositive for this information, we need not address the remaining arguments against its disclosure.

governmental body's purchase, holding, or disposal of restricted securities for the purpose of reinvestment nor does it apply to a private investment fund's investment in restricted securities.

Gov't Code § 552.143(c). You argue the remaining information pertains to the system's direct purchase, holding, or disposal of restricted securities. *See id.* § 552.143(d)(3) (defining "restricted securities" for purposes of section 552.143); *see also* 17 C.F.R. § 230.144(a)(3) (defining "restricted securities" as "securities acquired directly or indirectly from the issuer, or from an affiliate of the issuer, in a transaction or chain of transactions not involving public offering"). You inform us some of the remaining information involves Museum Tower, which you state is not a governmental body. You state the system's limited partnership interest in the Museum Tower is a security acquired directly from the issuer of the security, the Museum Tower, in a transaction that did not involve a public offering. You also inform us some of the remaining information at issue involves Red Consolidated, which you inform us is a restricted security not registered with the United States Securities and Exchange Commission "whereby the [s]ystem has invested through a limited liability company." You state the investment was not for purposes of reinvestment, and you inform us the purchase of this restricted security did not involve a public offering. Thus, you argue the remaining information, which pertains to the system's purchase, holding, or disposal of its limited partnership investment in the restricted securities at issue, is made confidential by section 552.143(c) of the Government Code. You further inform us no portion of the information at issue is subject to section 552.0225 of the Government Code. *See* Gov't Code § 552.0225(b) (listing categories of information held by a governmental body relating to its investments that are public and not excepted from disclosure under the Act). Based on your arguments and our review, we find the system has demonstrated the applicability of section 552.143(c) to the remaining information, which we have marked. Accordingly, the system must withhold the information we marked under section 552.143(c) of the Government Code.²

In summary, the system may withhold the information we marked under section 552.103 of the Government Code. The system must withhold the information we marked under section 552.143(c) 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.texasattorneygeneral.gov/open/>

²As our ruling is dispositive, we need not address the remaining arguments against disclosure of the information at issue.

[url_ruling_info.shtml](#), 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 may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Claire V. Morris Sloan
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Open Records Division

CVMS/som

Ref: ID# 529037

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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