



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

November 3, 2015

Mr. Justin S. Light
Counsel for the Tarrant Regional Water District
Pope, Hardwicke, Christie, Schell, Kelly & Ray, L.L.P.
500 West 7th Street, Suite 600
Fort Worth, Texas 76102

OR2015-23052

Dear Mr. Light:

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# 585803.

The Tarrant Regional Water District (the "district"), which you represent, received a request for six categories of information pertaining to a specified property.¹ You claim the submitted information is excepted from disclosure under sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative samples of information.² We have also received and considered the requestor's comments. *See* Gov't Code § 552.304 (interested party may submit written comments regarding availability of requested information).

¹We note the district sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also* *City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding when governmental entity, acting in good faith, requests clarification of unclear or overbroad request for public information, ten-business-day period to request attorney general opinion is measured from date request is clarified or narrowed).

²We assume the "representative samples" of records submitted to this office are 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 portions of the submitted information are 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:

...

(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). Exhibit H and Exhibit I contain invoices relating to the receipt or expenditure of funds by the district which are subject to section 552.022. The district must release the invoices pursuant to section 552.022(a)(3) unless the information is made confidential under the Act or other law. Although you raise section 552.103 of the Government Code for the invoice subject to section 552.022 in Exhibit H, this section is a discretionary exception to disclosure and does not make information confidential under the Act. *See Dallas Area Rapid Transit*, 4 S.W.3d at 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 (2005) (discretionary exceptions in general), 663 at 5 (1999) (waiver of discretionary exceptions). Therefore, the information subject to section 552.022 in Exhibit H, which we have marked, may not be withheld under section 552.103 of the Government Code. As you raise no other exceptions for this information, it must be released pursuant to section 552.022(a)(3). However, you raise section 552.101 of the Government Code for the information subject to section 552.022 in Exhibit I. Because section 552.101 of the Government Code protects information made confidential under law, we will address the applicability of this exception to the information at issue. Additionally, we will address your arguments for the information not subject to section 552.022.

Section 552.103 of the Government Code provides, in part, the following:

(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 claims an exception to disclosure under section 552.103 has the burden of providing relevant facts and documentation sufficient to establish the applicability of this exception to the information that it seeks to withhold. To meet this burden, the governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date the governmental body received 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, 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.). The governmental body must meet both prongs of this test for information to be excepted from disclosure under section 552.103(a). *See Open Records Decision No. 551 at 4 (1990).*

You state, and provide supporting documentation which demonstrates, on the date the district received the present request for information, the district was involved in a pending condemnation proceeding, styled *Tarrant Regional Water District v. Starfoam Manufacturing, Inc. and JPMorgan Chase Bank, N.A.*, Cause No. 2014-001900-3, in County Court No. 3, in Tarrant County, Texas. You also state the information at issue in Exhibit H pertains to the pending litigation. Based on the district's representation and our review, we find the district was a party to pending litigation on the date it received the request. Further, we agree the information at issue relates to the pending litigation because the pending condemnation proceeding pertains to the property specified in the request for information. Accordingly, we conclude the district may withhold the information not subject to section 552.022 in Exhibit H under section 552.103 of the Government Code.

The requestor contends the information at issue has been shared by the district with the opposing party. Whether the district has released information to the opposing party is a question of fact. This office cannot resolve disputes of fact in its decisional process. *See Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986).* Where fact issues are not resolvable as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our decision, or upon those facts that are discernible from the documents submitted for our inspection. *See ORD 552 at 4.* Accordingly, we must accept the district's representation that the district "has not produced any documents to [the opposing parties] in the lawsuit." However, we note once the 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 No. 349 at 2 (1982).* We also note the applicability of section 552.103(a) ends when the litigation is concluded. *Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 350 at 3 (1982), 349 at 2.*

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This exception encompasses information other statutes make confidential. In addition, a federal regulation enacted pursuant to statutory authority can provide statutory confidentiality for purposes of section 552.101 of the Act. *See* Open Records Decision No. 599 at 4 (1992). You raise section 552.101 in conjunction with part 24 of title 49 of the Code of Federal Regulations, which implements the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, and pertains to relocation assistance and real property acquisition for federal and federally-assisted programs. Section 24.9 of title 49 of the Code of Federal Regulations states, in part:

(a) Records. The Agency shall maintain adequate records of its acquisition and displacement activities in sufficient detail to demonstrate compliance with this part. These records shall be retained for at least 3 years after each owner of a property and each person displaced from the property receives the final payment to which he or she is entitled under this part, or in accordance with the applicable regulations of the Federal funding Agency, whichever is later.

(b) Confidentiality of records. Records maintained by an Agency in accordance with this part are confidential regarding their use as public information, unless applicable law provides otherwise.

49 C.F.R. § 24.9(a)-(b). You assert the district is an “agency” as understood by this section. “Agency” means a federal agency, state, state agency, or a person that acquires real property or displaces a person from property. *See id.* § 24.2(a)(1). “State Agency” means any department, agency or instrumentality of a state or of a political subdivision of a state, and any person who has the authority to acquire property by eminent domain under state law. *See id.* § 24.2(a)(1)(iv). You state Exhibit I consists of relocation and displacement records maintained by the district. You inform us the district is required “to maintain the relocation information pertaining to its displacement activities in sufficient detail to demonstrate compliance with part 24.” You further state the submitted information is maintained by the district in accordance with part 24 of title 49 of the Code of Federal Regulations. Based upon your representations and our review, we agree Exhibit I is confidential under section 24.9(b) of title 49 of the Code of Federal Regulations and must be withheld under section 552.101 of the Government Code.

In summary, the district must release the marked information subject to section 552.022(a)(3) of the Government Code in Exhibit H. The district may withhold the remaining information not subject to section 552.022 in Exhibit H under section 552.103 of the Government Code. The district must withhold Exhibit I under section 552.101 of the Government Code in conjunction with section 24.9(b) of title 49 of the Code of Federal Regulations.

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/orl_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,

A handwritten signature in black ink, appearing to read 'Thana Hussaini', written over a faint, illegible typed name.

Thana Hussaini
Assistant Attorney General
Open Records Division

TSH/som

Ref: ID# 585803

Enc. Submitted documents

c: Requestor
(w/o enclosures)