



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 24, 1995

Mr. Richard J. Ybarra
Assistant Attorney General
General Counsel Division
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR95-1126

Dear Mr. Ybarra:

Your predecessor asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. We assigned your request ID# 24663.

The Office of the Attorney General (the "OAG") has received a request for seven categories of information generally relating to the use of hazardous waste in cement production. Specifically, the requestor seeks, among other things, records of communications between the OAG's consumer protection division and certain environmentalist organizations; scientific information in the possession of the consumer protection division; the scientific basis for a statement attributed to a certain assistant attorney general; information relating to a civil investigative demand that the consumer protection division served on a cement company; and information relating to testimony given before a legislative body concerning the use of hazardous waste in cement production. You advise us that the OAG has made some of the requested information available to the requestor. You have submitted the remaining information to us for review, however, and claim that sections 552.101, 552.103, 552.106, 552.107, 552.108, and 552.111 of the Government Code except it from required public disclosure.

Section 552.101 of the Government Code excepts "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." You assert section 552.101 in conjunction with section 17.61 of the Business and Commerce Code, which permits the OAG's consumer protection division to obtain information pursuant to a civil investigative demand. Section 17.61 provides, in pertinent part:

(f) No documentary material produced pursuant to a demand under this section, unless otherwise ordered by a court for good cause shown, shall be produced for inspection or copying by, nor shall its contents be disclosed to any person other than the authorized employee of the consumer protection division without the consent of the person who produced the material. The consumer protection division shall prescribe reasonable terms and conditions allowing the documentary material to be available for inspection and copying by the person who produced the material or any duly authorized representative of that person

Bus. & Com. Code § 17.61(f). You advise us that the OAG obtained some of the requested information pursuant to a civil investigative demand under section 17.61. You have not indicated, nor are we otherwise aware, that either a court has ordered release of this information or that the person who produced the material consented to its release. Accordingly, the OAG must withhold this information under section 552.101 of the Government Code.¹

You also claim that section 552.101 of the Government Code in conjunction with section 17.61 of the Business and Commerce Code excepts certain information included in correspondence between the OAG and the subject of the civil investigative demand because it reveals information produced pursuant to the demand. We have reviewed the information that you seek to withhold on this basis. We conclude that most of it does not reveal the substance of materials produced pursuant to the civil investigative demand and therefore may not be withheld under section 552.101. We have indicated which information in the correspondence you must withhold under section 552.101 of the Government Code in conjunction with section 17.61 of the Business and Commerce Code.

You also claim that section 552.111 of the Government Code excepts some of the requested information from required public disclosure. Section 552.111 excepts an "interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the section 552.111 exception and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body at issue. This office also held, however, that section 552.111 does not except purely factual information. Open Records Decision No. 615 (1993) at 5-6.

¹In the event that the person requesting this information is the person who produced the material or a duly authorized representative of that person, the consumer protection division shall prescribe reasonable terms and conditions allowing the material to be available for inspection and copying. Bus. & Com. Code § 17.61(f).

We have examined the information submitted to us for review. It relates to certain policy functions that the OAG is authorized to perform under the Deceptive Trade Practices-Consumer Protection Act. *See* Bus. & Com. Code ch. 17, subch. E. We conclude that some of the submitted information constitutes advice, recommendations, and opinions reflecting the OAG's policymaking processes. Some of the submitted information, however, is purely factual and may not be withheld under section 552.111. We have marked the information that you may withhold under section 552.111 of the Government Code.²

Next, we address your assertion that section 552.107 of the Government Code exempts some of the requested information from required public disclosure. Section 552.107(1) protects information that reveals client confidences to an attorney, including facts and requests for legal advice, or that reveals the attorney's legal advice. *See* Open Records Decision No. 574 (1990). Section 552.107(1), however, does not protect purely factual information. *Id.*

The information for which you seek protection under section 552.107(1) of the Government Code relates to a contemplated action that the OAG's consumer protection division has authority to bring on behalf of the state pursuant to the Deceptive Trade Practices-Consumer Protection Act. *See* Bus. & Com. Code, subch. E. We have examined the information for which you seek section 552.107(1) protection. We conclude that some of the submitted information reveals an attorney's legal advice or opinion. However, some of the submitted information is purely factual in nature. We have marked the information that you may withhold under section 552.107(1) of the Government Code. We note that much of the remaining information excepted from disclosure under section 552.107, that is, attorney legal advice or opinion, is marked as protected under section 552.111 as explained above.

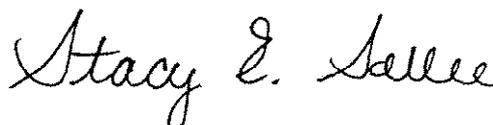
Finally, we address your contention that sections 552.103(a) and 552.108 of the Government Code except some of the requested information from required public disclosure. We note, however, that although you assert these exceptions, you do not explain how they apply. You are responsible for submitting in writing the reasons you believe the requested information is excepted from disclosure. Under the Open Records Act, all information held by governmental bodies is open to the public unless it is within a specific exception to disclosure. The custodian of records has the burden of proving that records are excepted from public disclosure. Attorney General Opinion H-436 (1974). If a governmental body does not claim an exception or fails to show how it applies to the records, it will ordinarily waive the exception unless the information is deemed confidential by the act. *See* Attorney General Opinion JM-672 (1987). Because you have not explained the applicability of sections 552.103(a) and 552.108, we conclude that you may not withhold any of the requested information under these exceptions.

²Because the information for which you seek protection under section 552.106 may be withheld under section 552.111, we need not address section 552.106 at this time. We note that our markings are in blue ink and are indicated by post-it notes attached to the marked documents.

Except for information excepted under sections 552.101, 552.107 and 552.111 of the Government Code, as indicated above, you must release the requested information in its entirety.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Stacy E. Sallee
Assistant Attorney General
Open Records Division

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Enclosures: Marked documents

Ref.: ID# 24663

cc: Mr. Albert R. Axe, Jr.
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(w/o enclosures)