



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 16, 1996

Mr. Larry W. Schenk
City Attorney
City of Longview
P.O. Box 1952
Longview, Texas 75606-1952

OR96-0033

Dear Mr. Schenk:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 28358.

The City of Longview (the "city") has received a request for information relating to a certain construction project. Specifically, the requestor seeks "records relating to Reynold's and Kay Inc.'s work on Fourth Street; records relating to A.K. Gillis' work on Fourth Street near Wal Street; and records of Conan Engineering Co.'s work on Hawkins Parkway and Fourth Street." You advise us that the city has or will make available to the requestor all information relating to the Hawkins Parkway project. You object, however, to release of some of the remaining information and claim that sections 552.103 and 552.107 of the Government Code except it from required public disclosure.

First, we address your assertion that section 552.103 of the Government Code excepts the requested information from required public disclosure. Section 552.103(a) excepts information

(1) relating to litigation of a civil or criminal nature or settlement negotiations, 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; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

For information to be excepted from public disclosure by section 552.103(a), litigation must be pending or reasonably anticipated and the information must relate to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 (1990) at 5. Although section 552.103(a) gives the attorney for a governmental body discretion to determine whether section 552.103(a) should be claimed, that determination is subject to review by the attorney general. *Open Records Decision Nos. 551 at 5; 511 (1988) at 3.*

You claim that the submitted information relates to reasonably anticipated litigation. The submitted information appears to relate to contract disputes between the city and various contractors. You have not explained, however, why litigation may be reasonably anticipated in this instance. Not every contract dispute results in litigation. We note that the governmental body claiming an exception is responsible for submitting in writing the reasons it believes the requested information is excepted from 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). In this instance, you have failed to demonstrate the applicability of section 552.103(a). No prior decision of this office has presumed a reasonable likelihood of litigation on the basis of the mere fact that a governmental body is involved in a contract dispute. We conclude, therefore, that the city may not withhold the requested information under section 552.103(a) of the Government Code.

You also seek to withhold some of the requested information under section 552.107(1) of the Government Code. Section 552.107(1) excepts information if:

(1) it is information that . . . an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Rules of the State Bar of Texas.

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). A record of a conference with opposing counsel would not be protected by section 552.107(1). *Id.* at 5. Likewise, the attorney-client privilege does not protect information shared with an attorney for communication to the other party to a pending suit or to a third person. *See* 36 TEX. JUR. 3d *Evidence* § 523 (1984). The application of section 552.107(1) must be determined on a case-by-case basis. Open Records Decision No. 589 (1991) at 1.

We have examined the information submitted to us for review. The records appear to relate to negotiations with certain construction companies under contract with the city. Most of the submitted records include information that does not fall within the attorney-client privilege, including, among other things, correspondence from the contractors to the city, city interagency memorandums that do not contain attorney-client communications, a

calendar indicating a contractor's progress on the project, a "Release of Lien" agreement between the city and a contractor, and correspondence between attorneys representing the city and attorneys representing the contractors. The city may not withhold such information under section 552.107(1) of the Government Code. Three of the submitted documents, however, reveal client confidences to an attorney or an attorney's legal advice. These documents have been marked and may be withheld from required public disclosure under section 552.107(1) of the Government Code. The remaining information must be released 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 should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Government Section

LRD/GCK/ch

Enclosures: Marked documents

Ref.: ID# 28358

cc: Ms. DeAnn Smith
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(w/o enclosures)