



September 19, 2001

Ms. Kimberly A. Frost
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OR2001-4194

Dear Ms. Frost:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 152175.

The Port of Houston Authority (the "authority"), which you represent, received two requests for copies of a variety of information pertaining to a proposed Bayport container site. You state that you will provide the requestor with some of the responsive information. However, you claim that the submitted information is excepted from disclosure pursuant to sections 552.101, 552.103, 552.104, 552.105, 552.110 and 552.111 of the Government Code. You also state that the request may implicate the proprietary interests of third parties. In accordance with section 552.305(d) of the Government Code, you notified third parties whose proprietary interests may be at stake of the request and of their rights to submit arguments to this office as to why the requested information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under Public Information Act (the "Act") in certain circumstances). We have considered the exceptions you claim and have reviewed the submitted representative sample documents.¹ We have also considered the section 552.305 comments submitted by third parties whose proprietary interests may be at stake, namely CH2M Hill, Inc., Gee & Jenson, and URS Corporation. Finally, we have also considered comments submitted by the requestor and the

¹ We 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.

Galveston District Army Corps of Engineers.² *See* Gov't Code § 552.304 (providing that interested party may make comments stating why information should or should not be released).

Initially, we address your request that our office confirm that much of the submitted representative sample documents are the same as or similar to information already excepted from disclosure in prior rulings, notably Open Records Letter Nos. 2000-1197 (2000) and 2000-3841 (2000), and that, therefore, the information represented by those submitted documents is subject to those previous determinations and may be withheld from disclosure. Based on our review of the submitted representative sample documents that are responsive to the current request for information, it is unclear whether those particular documents and the documents they represent were ruled on in Open Records Letter Nos. 2000-1197 (2000) and 2000-3841 (2000). Therefore, we cannot conclude that you may withhold any of the submitted information from disclosure based solely on the possibility that these particular documents and the documents that they represent were ruled on in the specified prior letter rulings. Accordingly, we address whether the submitted representative sample documents are excepted from disclosure based solely on the arguments that you have presented to us and our review of the submitted information.

Next, we note that section 552.022 of the Government Code makes certain information public, unless it is expressly confidential under other law. One category of public information under section 552.022 is "a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by [s]ection 552.108[.]" Gov't Code § 552.022(a)(1). Another category of public information under section 552.022 is "all working papers, research material, and information used to estimate the need for or expenditure of public funds or taxes by a governmental body, on completion of the estimate." Gov't Code § 552.022(a)(5). Two of the submitted documents, which we have marked, are completed reports and/or evaluations prepared for the authority. In addition, several of the submitted documents, which we have marked, appear to be working papers used to estimate the expenditure of public funds by the authority for the proposed Bayport container site. You claim that the documents encompassed by sections 552.022(a)(1) and 552.022(a)(5) are excepted from disclosure pursuant to sections 552.103 and 552.111 of the Government Code. However, sections 552.103 and 552.111 are discretionary exceptions under the Public

² We specifically note that the requestor claims that the authority violated section 552.301(d) of the Government Code by failing to provide the requestor with the brief that the authority submitted to our office pursuant to section 552.301(e)(1)(A). Section 552.301(d) provides that a governmental body that requests a decision from the attorney general must only provide the requestor with a written statement which indicates that the requestor wishes to withhold requested information and has asked the attorney general for a decision and a copy of the governmental body's written communication to the attorney general asking for the decision. *See* Gov't Code § 552.301(d). Based on our review of the information provided by the requestor, we conclude that the authority has complied with both aspects of section 552.301(d) of the Government Code.

Information Act and, as such, do not make information confidential.³ Accordingly, you may not withhold the marked completed reports and/or completed evaluations from disclosure under sections 552.103 or 552.111 of the Government Code. In addition, you may not withhold the marked working papers from disclosure under sections 552.103 or 552.111, if the estimates associated with those working papers have been completed.

You also claim that the documents encompassed by sections 552.022(a)(1) and 552.022(a)(5) are excepted from disclosure pursuant to section 552.101 of the Government Code.⁴ You claim that the release of the submitted information is governed by rules of the U.S. Army Corps of Engineers (the "Corps") that govern the availability of information created in the environmental impact statement development process. You also argue that, since the Corps' rules dictate when information related to an environmental impact statement is to be released, it is "impliedly confidential" until the prescribed release date. Finally, you state that the authority has been told by the Corps' project coordinator not to release the submitted information and that such information is not public in nature. We note that information is not confidential under the Act simply because the party submitting the information anticipates or requests that it be kept confidential. See *Industrial Foundation of the South v. Texas Indus. Accident Board*, 540 S.W.2d 668, 677 (Tex. 1976), cert. denied 430 U.S. 931 (1977). Additionally, information is not excepted from disclosure merely because it is furnished with the expectation that access to it will be restricted. See *Open Records Decision No. 180* (1977). Further, statutory confidentiality requires express language making particular information confidential. See *Open Records Decision No. 478* (1987). You do not claim that the submitted information is excepted from disclosure pursuant to section 552.101 in conjunction with the common law right to privacy or a statute that expressly makes the particular information confidential. Therefore, we cannot conclude that the authority may withhold the documents encompassed by sections 552.022(a)(1) and 552.022(a)(5) or any of the remainder of the submitted information from disclosure pursuant to section 552.101 of the Government Code. You claim no other exceptions to disclosure regarding the marked completed reports and/or evaluations or working papers. Accordingly, we conclude that you must release the completed reports and/or completed evaluations to the requestor. Additionally, if the estimates associated with the working

³ Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. See, e.g., *Open Records Decision Nos. 630 at 4* (1994) (governmental body may waive attorney-client privilege, section 552.107(1)), 551 (1990) (statutory predecessor to section 552.103 serves only to protect governmental body's position in litigation and does not itself make information confidential), 473 (1987) (governmental body may waive section 552.111), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions, therefore, do not constitute "other law" that makes information confidential.

⁴ Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Section 552.101 encompasses information protected by other statutes and the common law right to privacy.

papers have been completed, you must also release the marked working papers to the requestor.

You claim that the remaining submitted information is excepted from disclosure pursuant to section 552.103 of the Government Code. Section 552.103 provides in pertinent 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 authority maintains 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, and (2) the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *see also 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 authority must meet both prongs of this test for information to be excepted under section 552.103(a). Further, the litigation must be pending or reasonably anticipated on the date that the information is requested. *See Gov't Code § 552.103(c)*.

A governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture" when establishing that litigation is reasonably anticipated. *See Open Records Decision No. 452 at 4 (1986)*. Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.⁵ *See Open Records Decision Nos. 555 (1990), 518 at 5 (1989)* (litigation must be "realistically contemplated"). Whether litigation

⁵In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see Open Records Decision No. 336 (1982)*; hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see Open Records Decision No. 346 (1982)*; and threatened to sue on several occasions and hired an attorney, *see Open Records Decision No. 288 (1981)*.

is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986). You state, and provide documentation showing, that a potential opposing party has indicated his intention to litigate the issues that are the subject of this request for information under various environmental statutes and the Texas Constitution. Based on your arguments and our review of the remaining submitted information, we conclude that litigation is reasonably anticipated in this matter and that the remaining submitted information is related to the reasonably anticipated litigation for the purposes of section 552.103 of the Government Code. Accordingly, we conclude that you may withhold most of the remaining submitted information from disclosure pursuant to section 552.103.⁶ You may also withhold from disclosure the marked working papers pursuant to section 552.103, if the estimates associated with those working papers have not been completed.

However, we note that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. *See* Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a) and must be disclosed.⁷ It appears that two of the submitted documents in Exhibits H-2 and I-3, which we have marked, were created by the potential opposing party in this matter. Accordingly, you may not withhold these two marked documents from disclosure pursuant to section 552.103 of the Government Code.

However, you also claim that these two marked documents are excepted from disclosure pursuant to sections 552.110 and 552.111 of the Government Code. Accordingly, we address each of these exceptions to disclosure with respect to these two marked documents. You claim that the submitted information in Exhibits I-1 through I-7, which includes one of the documents created by the potential opposing party in this matter, is excepted from disclosure pursuant to section 552.110 of the Government Code. It does not appear that the marked document in Exhibit I-3, which has been created by the potential opposing party in this matter, implicates the proprietary interests of any third party. In addition, we note that an interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from disclosure under section 552.110 of the Government Code. *See* Gov't Code § 552.305(d)(2)(B). The possibility that the document at issue does not implicate the proprietary interests of any third party is supported by the fact that, as of the date of this letter, no third party submitted any comments to this

⁶ Having found this information excepted from disclosure under section 552.103 of the Government Code, we need not address the applicability of your other claimed exceptions to this particular information.

⁷ Further, the applicability of section 552.103(a) ends once the litigation has been concluded. *See* Attorney General Opinion MW-575 (1982); *see also* Open Records Decision No. 350 (1982).

office explaining why this document should not be released.⁸ Therefore, we have no basis to conclude that it is excepted from disclosure under section 552.110 of the Government Code. *See* Open Records Decision Nos. 552 at 5 (1990) (stating that if governmental body takes no position, attorney general will grant exception to disclosure under statutory predecessor to Gov't Code § 552.110(a) if third party makes *prima facie* case that information qualifies as trade secret under section 757 of Restatement of Torts, and no argument is presented that rebuts claim as matter of law), 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under Gov't Code § 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm).

You claim that all of the submitted information, including the marked documents in Exhibits H-2 and I-3 which were created by the potential opposing party in this matter, is excepted from disclosure pursuant to section 552.111 of the Government Code. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." Although you state that all of the submitted information reflects pre-decisional advice, recommendations and opinions of and by authority personnel, state and federal agencies, representatives of surrounding communities, and consultants that the authority is considering as it develops the proposed Bayport container site project, we note that a governmental body waives its interest in section 552.111 of the Government Code when information it holds has been disclosed to a member of the public. *See* Open Records Decision Nos. 400 (1983), 435 (1986). In this instance both of the marked documents at issue were created by the potential opposing party in this matter. Therefore, we cannot conclude that they constitute interagency or intraagency memoranda that may be withheld from disclosure pursuant to section 552.111 of the Government Code. Accordingly, you must release these two marked documents to the requestor.

In summary, you must release the marked completed reports and/or evaluations to the requestor pursuant to section 552.022(a)(1) of the Government Code. You must release the marked working papers pursuant to section 552.022(a)(5) of the Government Code, if the estimates associated with these working papers have been completed. You may withhold most of the remaining portions of the submitted information pursuant to section 552.103 of the Government Code. You may also withhold the marked working papers from disclosure pursuant to section 552.103, if the estimates associated with these working papers have not been completed. Finally, you must release two marked documents that were created by a potential opposing party to the litigation which is anticipated in this matter.

⁸ Although we received comments pursuant to section 552.305(a) from some third parties whose proprietary interests may be at stake if some of the requested information is released, we note that all such comments pertained to information that we conclude is excepted from disclosure pursuant to section 552.103 of the Government Code. Accordingly, none of those submitted comments are relevant to the document at issue in Exhibit I-3.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

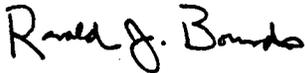
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/seg

Ref: ID# 152175

Enc. Marked documents

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