



October 2, 2002

Ms. Ann Bright
Section Chief
Legal and Compliance Division
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2002-5569

Dear Ms. Bright:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 170123.

The Texas Department of Insurance (the “department”) received a request for a bid and other information related to a particular request for proposals. You claim that the requested information is excepted from disclosure under sections 552.103, 552.104, 552.107, 552.111 and 552.137 of the Government Code. Pursuant to section 552.305 of the Government Code, you have also notified CAT*ASI, a third party whose proprietary interests may be implicated by the request. *See* Gov’t Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); 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 in certain circumstances). In its brief to this office, CAT*ASI asserts that portions of its proposal are excepted from disclosure under section 552.110 of the Government Code. We have considered all of the submitted arguments and reviewed the information at issue.¹

You assert that some of the submitted information relates to reasonably anticipated litigation and is attorney work product prepared in anticipation of such litigation. Section 552.103 of

¹You have included a document that you have marked as being non-responsive. We do not address that document in this ruling.

the Government Code, which excepts from disclosure information relating to reasonably anticipated litigation, provides as follows:

(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.

The department has 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 is reasonably anticipated on the date the governmental body receives the request for information and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *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 department must meet both prongs of this test for information to be excepted under section 552.103(a).

The fact that a potential opposing party has hired an attorney who makes a request for information does not establish that litigation is reasonably anticipated. Open Records Decision No. 361 (1983). In order to establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." 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.² Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation

²In 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).

must be "realistically contemplated"). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982).

Section 552.111 of the Government Code protects, in part, attorney work product. In order to withhold attorney work product, a governmental body must demonstrate that the material was 1) created for trial or in anticipation of civil litigation, and 2) consists of or tends to reveal an attorney's mental processes, conclusions and legal theories. Open Records Decision No. 647 (1996). The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. Open Records Decision No. 647 at 4 (1996). The second prong of the work product test requires the governmental body to show that the documents at issue tend to reveal the attorney's mental processes, conclusions, and legal theories. The work product privilege also encompasses the mental impressions, opinions, conclusions, or legal theories of an attorney's representatives. Tex. R. Civ. P. 192.5(b)(1).

Both section 552.103 and the work product privilege encompassed by section 552.111 require a governmental body to demonstrate that litigation is reasonably anticipated. In this case, you inform us that the request at issue came from an attorney representing a bidder whose proposal was disqualified by the department. You argue that litigation is reasonably anticipated because of the "nature and potential value of the contract" and because the disqualified bidder challenged its disqualification at the department level. Having reviewed your arguments, we find that the department has failed to provide this office with concrete evidence that litigation is reasonably anticipated for purposes of section 552.103 or the work product privilege encompassed by section 552.111. Accordingly, none of the submitted information may be withheld on the basis of those exceptions.

You also assert that some of the submitted information is excepted under section 552.104 of the Government Code. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The purpose of section 552.104 is to protect a governmental body's interests in competitive bidding situations. *See* Open Records Decision No. 592 (1991). Moreover, section 552.104 requires a showing of some actual or specific harm in a particular competitive situation; a general allegation that a competitor will gain an unfair advantage will not suffice. Open Records Decision No. 541 at 4 (1990). This office has long held that section 552.104 does not except information relating to competitive bidding situations once a contract is in effect.

See, e.g., Open Records Decision Nos. 541 (1990), 514 (1988), 306 (1982), 184 (1978), 75 (1975).

In this case, you inform us that the department has not yet signed a contract with CAT*ASI and indicate that the release of portions of the requested information would interfere with the department's on-going negotiations. We therefore conclude that the information that relates to the bid process is excepted from disclosure based on section 552.104 until such time as the contract is in effect. Based on our decision under section 552.104, we need not address CAT*ASI's arguments regarding section 552.110.

You contend that other submitted documents are excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) excepts from disclosure information that an attorney cannot disclose because of a duty to his client. In Open Records Decision No. 574 (1990), this office concluded that section 552.107 excepts from public disclosure only "privileged information," that is, information that reflects either confidential communications from the client to the attorney or the attorney's legal advice or opinions; it does not apply to all client information held by a governmental body's attorney. Open Records Decision No. 574 at 5 (1990). The privilege extends to communications "between the client or a representative of the client and the client's lawyer or a representative of the lawyer." Tex. R. Evid. 503(b)(1)(A). Having reviewed these documents, we agree that many of them reflect client confidences or attorney advice, opinion, or recommendation. This information, which we have marked, may be withheld under section 552.107(1). The remaining documents may not be withheld under this exception as they contain neither client confidences nor an attorney's advice, opinion, or recommendation.

You also assert that some of the submitted information constitutes intra- or inter-agency memoranda that are protected under section 552.111 of the Government Code. This section 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." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), 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. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.--Austin 2001, no pet.). The preliminary draft of a policymaking document that has been released or is intended for release in final form is excepted from disclosure in its entirety under section 552.111 because such a draft necessarily represents the advice, recommendations, or opinions of the drafter as to the form and content of the final document. Open Records Decision No. 559 at 2 (1990). An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111

does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Arlington Indep. Sch. Dist.*, 37 S.W.3d at 160; ORD 615 at 4-5. After reviewing the information at issue, we have determined that a portion thereof reflects the department's policymaking processes. This information, which we have marked, may be withheld under section 552.111. We have also marked drafts of policymaking documents, which may be withheld under section 552.111 but only if final versions of these documents were released or are intended for release.

Your final contention is that certain e-mail addresses contained in the submitted information are excepted from disclosure under section 552.137 of the Government Code. This section provides that "[a]n e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Public Information Act]." You inform us that none of the owners of these e-mail addresses have affirmatively consented to their release. Therefore, the department must withhold all of the marked e-mail addresses in accordance with section 552.137. *See Gov't Code* § 552.137(b).

Finally, we note that a portion of the submitted information may be excepted under section 552.117. Pursuant to this section, the department must withhold the home addresses, home telephone numbers, social security numbers, and family member information of current or former employees who made an election prior to the date this request for information was received to keep their personal information confidential. *See Gov't Code* §§ 552.117(1), .024. Whether a particular piece of information is public must be determined at the time the request for it is made. *See Open Records Decision No. 530 at 5 (1989)*. We have marked information that must be withheld if a timely election was made.

In summary, the department may withhold marked portions of the submitted information in accordance with sections 552.104, 552.107, and 552.111. Marked e-mail addresses must be withheld under section 552.137. We have also marked information that must be withheld under section 552.117(1) if a timely election was made. All other information must be released.

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).

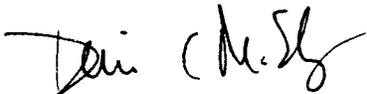
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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 Texas Building and Procurement 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. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. 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,



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Open Records Division

DCM/seg

Ref: ID# 170123

Enc. Submitted documents

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