



October 29, 2002

Ms. Cynthia Villarreal-Reyna
Section Chief
Agency Counsel
Legal & Compliance Division, MC 110-1A
Texas Department of Insurance
P.O. Box 149104
Austin, Texas 78714-9104

OR2002-6141

Dear Ms. Villarreal-Reyna::

Ms. Sara Shiplet-Waitt, Senior Associate Commissioner, Legal and Compliance Division, has asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. The request was assigned ID# 171383.

The Texas Department of Insurance (the "department") received a request for five categories of information related to the contract between the department and Systems Integration Group, Inc. ("SIG"). The department claims that some of the requested information is excepted from disclosure under sections 552.103, 552.107, 552.111, 552.136, and 552.137 of the Government Code. Pursuant to section 552.305 of the Government Code, the department notified SIG because a portion of the requested information may implicate its proprietary interests.¹ As of the date of this letter, SIG has not submitted to this office its reasons explaining why any of its information should not be released.² Therefore, SIG has provided us no basis on which to conclude that the submitted information is excepted from disclosure. *See* Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized

¹ *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); *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 in Public Information Act (the "Act") in certain circumstances).

² 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 public disclosure. *See* Gov't Code § 552.305(d)(2)(B).

allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Thus, except as noted below, SIG's information must be released. With regard to the remaining submitted information, we have considered the exceptions claimed and have reviewed the information.

Section 552.103 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.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show the applicability of an exception in a particular situation. The test for establishing that section 552.103(a) applies is a showing that (1) litigation is pending or reasonably anticipated on the date that the governmental body received 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 (Tex. App.--Austin, 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 588 (1991).

Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the district must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). Among other examples, this office has concluded that litigation was reasonably anticipated where the opposing party took the following objective steps toward litigation: (1) filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), *see* Open Records Decision No. 336 (1982); (2) 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 (3) threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981). A governmental body may also establish that litigation is

reasonably anticipated by the receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party. Open Records Decision No. 555 (1990).

The department states that during the term of its contract with SIG, the parties engaged in discussions regarding the services provided by SIG under the terms of the contract and related work orders. The department advises that the parties have not resolved the issues related to performance under the contract and the work orders, and indicates it has sought representation from this office in resolving the dispute. Further, the department has engaged in settlement discussions with SIG, third parties are currently litigating related issues, and some of the submitted documents are related to potential litigation issues, according to the department. Upon review of your arguments and the submitted documents, we find based on the totality of the circumstances that the department has demonstrated that the information it has marked pursuant to section 552.103 relates to litigation that the department reasonably anticipated on the date of its receipt of the request for information. Thus, the department may withhold this information under section 552.103. *See Gov't Code § 552.103(c)*. As section 552.103 is dispositive for this information, we do not address your claim under section 552.107 or your work product claim under section 552.111.

However, we note that if the opposing party in the litigation has seen or had access to any of the information in these records, there is no section 552.103(a) interest in withholding that information from the requestor. Open Records Decision Nos. 349 (1982), 320 (1982). In addition, the applicability of section 552.103(a) ends once the litigation concludes. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You claim that some additional information is excepted under section 552.111. 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." 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. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 364 (Tex. 2000); *see also Arlington Indep. Sch. Dist. v. Texas Attorney Gen.*, 37 S.W.3d 152 (Tex. App.--Austin, 2001, no pet.). The purpose of section 552.111 is "to protect from public disclosure advice and opinions on policy matters and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.). 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. *See Open Records Decision No. 615 at 5-6 (1993)*.

In addition, a 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. *See* Open Records Decision No. 559 at 2 (1990). Based on our review of your representations and the information at issue, we conclude that some of the information constitutes draft communications between department staff that consists of advice, opinions, and recommendations reflecting the policymaking processes of the department. Accordingly, we conclude that the department may withhold the information we have marked from disclosure pursuant to section 552.111 of the Government Code. None of the remaining information at issue is excepted under section 552.111.

The department further claims that some information is excepted from disclosure under section 552.136. Section 552.136 makes certain account numbers confidential. It provides, in relevant part, as follows:

Sec. 552.136. CONFIDENTIALITY OF CREDIT CARD, DEBIT CARD, CHARGE CARD, AND ACCESS DEVICE NUMBERS.

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value; or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. We agree that the department must withhold the account numbers it has marked pursuant to section 552.136. We have marked additional account numbers that must also be withheld under section 552.136.

Furthermore, the submitted documents contain e-mail addresses that must be withheld under section 552.137 of the Government Code. Section 552.137 requires the department to withhold an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body, unless the member of the public has affirmatively consented to its release. *See* Gov't Code § 552.137(a), (b). You do not

inform us that a member of the public has affirmatively consented to the release of any e-mail address contained in the submitted materials. However, we note that section 552.137 does not apply to a government employee's work e-mail address. Therefore, the department must withhold the e-mail addresses it has marked under section 552.137, with the exception of the e-mail addresses that we have marked for release. We have marked an additional e-mail address that must also be withheld under section 552.137.

In summary, the department may withhold the information it has marked pursuant to section 552.103. The department may withhold the additional information we have marked under section 552.111. The department must withhold the bank account numbers it has marked, and the additional numbers we have marked, under section 552.136. The department must withhold the e-mail addresses it has marked under section 552.137, with the exception of the addresses we have marked for release, and must withhold the additional e-mail address we have marked. The remaining requested information must be released to the requestor.

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).

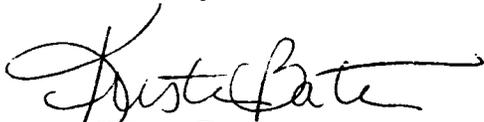
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following 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,



Kristen Bates
Assistant Attorney General
Open Records Division

KAB/seg

Ref: ID# 171383

Enc. Submitted documents

c: Ms. Nancy Hesse Herman
Coats Rose
1001 Fannin, Suite 800
Houston, Texas 77002-6707
(w/o enclosures)

Ms. Melissa A. Haselden
Attorney for SIG, Inc.
Weycer, Kaplan, Pulaski & Zuber
11 Greenway Plaza, Suite 1400
Houston, Texas 77046
(w/o enclosures)