



OFFICE *of the* ATTORNEY GENERAL
GREG ABBOTT

January 31, 2003

Mr. Frank Stenger-Castro
General Counsel
San Antonio Water System
P.O. Box 2449
San Antonio, Texas 78298-2449

OR2003-0676

Dear Mr. Stenger-Castro:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 175842.

The San Antonio Water System ("SAWS") received a request for:

- 1) any and all plans and proposals submitted by the Aluminum Company of America ("Alcoa") to meet contract obligations defined under Section 3.03 [of the contract between SAWS and Alcoa] Timing and Development;
- 2) any and all communications between SAWS and any outside source relating to Section 3.03, including:
 - A) designated point of delivery;
 - B) proposed project plan; and
 - C) additional lands identified in the proposed project plan as necessary for project completion;
- 3) any and all information required by Section 5.01 Regulatory Approvals relating to any and all support provided by SAWS to Alcoa in obtaining any and all necessary permits for their mining operations or discharge of waters from the mine; and

- 4) an itemized breakdown of any and all costs reimbursed to Alcoa to date under Section 6.01 Reimbursement of Costs.

You indicate that you do not have information responsive to the third category of information. We note that the Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.--San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986). You also state that you will release information responsive to the fourth category of information requested. You claim that information responsive to categories one and two of the request is excepted from disclosure under sections 552.104, 552.105, 552.110, and 552.111 of the Government Code. You indicate, and provide documentation showing, that SAWS has notified Alcoa of the request for information in order to afford it an opportunity to supply objections to release of the submitted information. See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released). We have considered all submitted arguments and reviewed the submitted information.

As an initial matter, we must consider the timeliness of your request for a decision from this office. The requestor asserts that, according to the United Postal Service Domestic Return Receipt, SAWS received the request on November 4, 2002, rather than on November 5, 2002, as stated by SAWS. You state, however, that the person whose signature appears on the return receipt dated November 4, 2002, is not an employee of SAWS and that the request was physically received by SAWS on November 5, 2002. Whether SAWS received the request on November 4, 2002, or November 5, 2002, presents a fact issue. This office cannot resolve disputes of fact in the opinion process. See Open Records Decision Nos. 592 at 2 (1991), 552 at 4 (1990), 435 at 4 (1986). Where a fact issue cannot be resolved as a matter of law, we must rely on the facts alleged to us by the governmental body requesting our opinion, or upon those facts that are discernible from the documents submitted for our inspection. See Open Records Decision No. 552 at 4 (1990). Therefore, based on your representations and the related documentation, we find that SAWS first received the request on November 5, 2002.

Under section 552.301(b), SAWS then had until and including November 20, 2002, in which to request our decision with respect to the request. You requested our decision with regard to the request by letter postmarked November 20, 2002. Thus, your request for a decision with regard to this request was timely under section 552.301(b). Accordingly, we will consider all of your claimed exceptions with respect to the submitted information.

Next, we note that some of the submitted information is subject to section 552.022 of the Government Code. Section 552.022 provides, in relevant part

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Exhibits 3, 11, and 12 consist of executed contract modifications relating to the expenditure of public or other funds by a governmental body and are expressly public under section 552.022(a)(3) unless they are confidential under other law. While Alcoa contends that these exhibits are excepted under section 552.110, and SAWS contends that Exhibit 3 is excepted under section 552.105, section 552.105 is a discretionary exception under the Public Information Act and does not constitute "other law" for purposes of section 552.022. *See* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). Thus, we will determine only whether these exhibits are excepted under section 552.110.

We will address Alcoa's section 552.110 claim with regard to Exhibits 3, 11, and 12, as well as the other submitted documents. Alcoa has submitted to this office its reasons explaining why its information should not be released. *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 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).

Alcoa argues that the requested information is excepted under section 552.110(b) of the Government Code. Section 552.110(b) protects "[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]" Gov't Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. Gov't Code § 552.110(b); *see also National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974); Open Records Decision No. 661 (1999).

Alcoa states that the submitted information contains information reflecting the business strategy developed by Alcoa for constructing, operating, and maintaining the water system contemplated under the contract. The submitted documents also contain information proposing the location of the point of delivery, and identifying and planning for acquisition of property by Alcoa or SAWS as necessary. Alcoa asserts that it finds itself in market

competition with not only aluminum manufacturers, but also major landowners, water suppliers, mine operators, fuel and power producers, etc. Further, Alcoa contends that access to its information would give its market competitors an unfair advantage and cause substantial harm to the competitive position of both Alcoa and SAWS. After reviewing Alcoa's arguments and the submitted information, we conclude that Alcoa has not demonstrated that disclosure of its information would cause it substantial competitive harm. Accordingly, SAWS may not withhold any of the submitted information under section 552.110(b).

We will next address SAWS' claim under section 552.105 for Exhibits 1, 2, 8, and 9. Section 552.105 excepts from disclosure information relating to:

- (1) the location of real or personal property for a public purpose prior to public announcement of the project; or
- (2) appraisals or purchase price of real or personal property for a public purpose prior to the formal award of contracts for the property.

Section 552.105 is designed to protect a governmental body's planning and negotiating position with regard to particular transactions. Open Records Decision Nos. 564 (1990), 357 (1982), 310 (1982). Information excepted under section 552.105 that pertains to such negotiations may be excepted so long as the transaction is not complete. Open Records Decision No. 310 (1982). This office has concluded that information about specific parcels of land acquired in advance of others to be acquired for the same project could be withheld where this information would harm the governmental body's negotiating position with respect to the remaining parcels. Open Records Decision No. 564 at 2 (1990). A governmental body may withhold information "which, if released, would impair or tend to impair [its] 'planning and negotiating position in regard to particular transactions.'" Open Records Decision No. 357 at 3 (1982) (quoting Open Records Decision No. 222 (1979)). The question of whether specific information, if publicly released, would impair a governmental body's planning and negotiation position in regard to particular transactions is a question of fact. Accordingly, this office will accept a governmental body's good faith determination in this regard, unless the contrary is clearly shown as a matter of law. Open Records Decision No. 564 (1990).

SAWS states that the information at issue lists properties to acquire, easements and road crossing permits needed, and estimated costs for easement acquisition for parcels of land that have not been disclosed to date. You indicate that the project is still subject to extensive planning and negotiation and release of the information would damage SAWS' negotiating position with respect to nearby parcels that are planned or being considered for inclusion. Based on your representations and our careful review of the submitted documents, we believe that you have demonstrated the applicability of section 552.105 to portions of the submitted

documents. Thus, SAWS may withhold from disclosure the information in Exhibits 1 and 8 that we have marked under section 552.105. SAWS may not withhold any of the remaining documents under section 552.105.

SAWS claims that Exhibits 4-7 and 9 are excepted from disclosure under section 552.104. Section 552.104 excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." 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). Section 552.104 does not except information relating to competitive bidding situations once a contract has been awarded. Open Records Decision Nos. 306 (1982), 184 (1978). Based on your arguments and our review of the submitted information, we conclude that SAWS has not demonstrated the applicability of section 552.104 to Exhibits 4-7 and 9. As such, SAWS may not withhold Exhibits 4-7 and 9 under section 552.104.

SAWS also argues that section 552.111 excepts Exhibit 2 from disclosure. 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." This exception applies not only to internal memoranda, but also to memoranda prepared by consultants of a governmental body. Open Records Decision Nos. 462 at 14 (1987), 298 at 2 (1981). 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.). 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. Based on our review of Exhibit 2, we believe that you have demonstrated the applicability of section 552.111 to portions of Exhibit 2. Thus, SAWS may withhold from disclosure Exhibit 2 under section 552.111 with the exception of the portion that we have marked for release.

In summary, SAWS may withhold the information in Exhibits 1 and 8 that we have marked under section 552.105. SAWS may also withhold from disclosure Exhibit 2 under

section 552.111 with the exception of the portion that we have marked for release. The remaining 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,



Heather Pendleton Ross
Assistant Attorney General
Open Records Division

HPR/sdk

Ref: ID# 175842

Enc: Submitted documents

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