



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 29, 2003

Mr. Mark Gentle
Legal Counsel
Texas Building and Procurement Commission
P. O. Box 13047
Austin, Texas 78711

OR2003-6852

Dear Mr. Gentle:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 188501.

The Texas Building and Procurement Commission (the "commission") received a request for information pertaining to a specified business entity and "GSC Project No. 96-002-303." You claim that the requested information, or portions thereof, is excepted from disclosure pursuant to sections 552.101, 552.103, 552.107, 552.110, 552.111, and 552.137 of the Government Code.¹ We have considered the exceptions you claim and have reviewed the submitted representative sample documents.²

¹ Although the commission claims that the requested information is excepted from disclosure pursuant to section 552.110 of the Government Code, we note that the commission has not submitted comments to us stating the reasons why section 552.110 would allow any portion of the requested information to be withheld from disclosure. *See* Gov't Code §§ 552.301(e)(1)(A), .302. Accordingly, we do not address the commission's claim under section 552.110 of the Government Code.

² 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.

Initially, we note that we have marked a portion of the submitted information that was created subsequent to the date of the commission's receipt of this request. Chapter 552 of the Government Code does not require a governmental body to release information that did not exist when it received a request for information. *See Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266, 267-68 (Tex. Civ. App. – San Antonio 1978, writ dismissed); *see also* Open Records Decision Nos. 605 at 2 (1992), 452 at 3 (1986), 362 at 2 (1983). Accordingly, we conclude that the commission need not release this marked information to the requestor in response to this ruling.

In addition, we note that portions of the remaining submitted information are subject to section 552.022 of the Government Code. Section 552.022(a) provides in pertinent part:

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:

...

(5) 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). This particular information, which we have marked, must be released to the requestor on completion of the associated estimates, unless it is confidential under other law. Although the commission claims that this information is excepted from disclosure pursuant to section 552.103 of the Government Code, we note that this exception to disclosure is a discretionary exception to disclosure under the Public Information Act (the "Act") that does not constitute "other law" for purposes of section 552.022.³ Accordingly, we conclude that the commission may not withhold any portion of this particular information under section 552.103 of the Government Code. Consequently, the commission must release this marked information to the requestor.

Next, we address your section 552.103 claim with respect to the remaining submitted information. Section 552.103 provides in pertinent part:

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).

- (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 commission 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 on the date that the governmental body receives the request for information, 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 commission must meet both prongs of this test for information to be excepted under section 552.103(a).

A governmental body must provide this office with "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.⁴ *See* Open Records Decision Nos. 555 (1990), 518 at 5 (1989) (litigation 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).

⁴ In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: 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).

Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986).

You state that the requestor's client filed a claim for damages for breach of contract against the commission under the provisions of section 2260.051 of the Government Code prior to the date that the commission received this request. You also state that the claim arose from the client's work on the Texas Department of Health Lab Building, which is the commission's project number 96-002-303, and that the claim is in the amount of \$1,238,252.00. In addition, you represent that at the time the commission received this request the parties involved in this dispute were in negotiation discussions pursuant to chapter 2260 that are required to be conducted prior to any referral of the matter to the State Office of Administrative Hearings. You have provided us with various documentation in support of these representations. Based on your arguments, our review of the remaining submitted information, and the totality of the circumstances involved in this matter, we find that the commission reasonably anticipated litigation prior to the date that it received this request and that the remaining submitted information is related to that reasonably anticipated litigation for purposes of section 552.103. Accordingly, we conclude that the commission may withhold some of the remaining submitted information, which we have marked, pursuant to section 552.103 of the Government Code.⁵

However, we note that once information has been obtained by all parties to the anticipated 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 potential opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a) and may not be withheld from disclosure on that basis.⁶ We note that some of the remaining submitted information has been obtained by the potential opposing party in this matter. Accordingly, we conclude that this particular information may not be withheld under section 552.103 of the Government Code. Consequently, we address your section 552.137 claim with respect to certain e-mail addresses that are contained within this information.

Section 552.137 of the Government Code provides:

- (a) Except as otherwise provided by this section, an e-mail address of a member of the public that is provided for the purpose of communicating

⁵ Because we base our ruling with respect to this particular information on section 552.103 of the Government Code, we need not address your claims for portions of this information with respect to sections 552.101, 552.107, and 552.111 of the Government Code.

⁶ Further, we note that 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).

electronically with a governmental body is confidential and not subject to disclosure under this chapter.

(b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

(c) Subsection (a) does not apply to an e-mail address:

(1) provided to a governmental body by a person who has a contractual relationship with the governmental body or by the contractor's agent;

(2) provided to a governmental body by a vendor who seeks to contract with the governmental body or by the vendor's agent;

(3) contained in a response to a request for bids or proposals, contained in a response to similar invitations soliciting offers or information relating to a potential contract, or provided to a governmental body in the course of negotiating the terms of a contract or potential contract; or

(4) provided to a governmental body on a letterhead, coversheet, printed document, or other document made available to the public.

(d) Subsection (a) does not prevent a governmental body from disclosing an e-mail address for any reason to another governmental body or to a federal agency.

Act of June 2, 2003, 78th Leg., R.S., ch. 1089, § 1 2003 Tex. Sess. Law Serv. 3124 (to be codified as amendment to Gov't Code § 552.137). Section 552.137 requires a governmental body to withhold certain e-mail addresses of members of the public that are provided for the purpose of communicating electronically with the governmental body, unless the members of the public with whom the e-mail addresses are associated have affirmatively consented to their release. Section 552.137 does not apply to a government employee's work e-mail address or a business's general e-mail address or web address. E-mail addresses that are encompassed by subsection 552.137(c) are also not excepted from disclosure under section 552.137. We find that the e-mail addresses that you have marked within the information that is not excepted from disclosure under section 552.103 are encompassed by subsection 552.137(c) and, therefore, are not excepted from disclosure under section 552.137(a). Consequently, the commission must release these marked email

addresses to the requestor. Further, the commission must release to the requestor the remaining portions of these particular documents that are not excepted from disclosure under section 552.103.

In summary, the commission must release the information that we have marked pursuant to section 552.022(a)(5) of the Government Code. The commission may withhold the information that we have marked pursuant to section 552.103 of the Government Code. The commission must release the remaining submitted information 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).

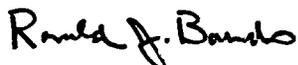
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

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,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/lmt

Ref: ID# 188501

Enc. Marked documents

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