



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

June 1, 2004

Mr. David Ross
Law Offices of Ralph Brown, P.C.
2008 Northwest Military Highway
San Antonio, Texas 78213

OR2004-4454

Dear Mr. Ross:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 202601.

The San Antonio River Authority (the "authority"), which you represent, received a request for fifteen categories of information related to the Lower Guadalupe Water Supply Project (the "LGWSP"). You state that the authority will provide the requestor with some of the requested information. You also state that the authority does not have a log responsive to category fifteen of the request for information.¹ You claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.105, 552.107, and 552.111 of the Government Code. Additionally, you have notified three interested third parties of the authority's receipt of the request for information pursuant to section 552.305

¹We note that the Public Information Act ("Act") does not require the authority to answer factual questions, perform legal research, or create new information in responding to a request. See Open Records Decision Nos. 605 at 2 (1992), 563 at 8 (1990), 555 at 1-2 (1990), 534 at 2-3 (1989); see also *AT&T Consultants, Inc. v. Sharp*, 904 S.W.2d 668, 676 (Tex.1995); *Fish v. Dallas Indep. Sch. Dist.*, 31 S.W.3d 678, 681 (Tex. App.—Eastland, pet. denied). Additionally, we note that the Act does not require the authority 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); see also Attorney General Opinion JM-48 (1983) (governmental body not required to comply with standing request for information to be collected or prepared in future). However, the authority must make a good faith attempt to relate a request to information it holds. See Open Records Decision No. 561 at 8 (1990).

of the Government Code.² 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 section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered your arguments and reviewed the submitted representative sample of information.³

Initially, you state that the computer user names and passwords in the responsive information are "related to security issues for computers as provided in [section] 552.139 of the Act." You state that "without the security feature of being able to limit access to this portal with unique passwords, the LGWSP portal would be vulnerable to being accessed by unauthorized persons." In Open Records Decision No. 581 (1990), this office determined that certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property is not the kind of information made public under section 552.021 of the Government Code. Based on the reasoning in Open Records Decision No. 581 and our review, we determine that the usernames and passwords we have marked in Exhibit 14 do not constitute public information under section 552.002 of the Government Code. Accordingly, this information is not subject to the Act and need not be released. Based on this finding, we do not reach your claim under section 552.139 for this information.

Next, we note that a portion of the remaining information at issue is subject to section 552.022 of the Government Code. The attorney fee bill information submitted as Exhibit 2 is subject to section 552.022(a)(16). Section 552.022(a)(16) provides that information in a bill for attorney's fees that is not protected under the attorney-client privilege is not excepted from required disclosure unless it is expressly confidential under other law. Gov't Code § 552.022(a)(16). Although the authority claims the information in Exhibit 2 is excepted from disclosure under sections 552.103 and 552.105 of the Government Code, we note that sections 552.103 and 552.105 are discretionary exceptions that protect the governmental body's interests and do not constitute "other law" for purposes of section 552.022(a). See *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.— Dallas 1999, no pet.) (governmental body may waive section 552.103); See Open Records Decision Nos. 564 (1990) (governmental body may waive statutory predecessor to Gov't Code § 552.105); 665 at 2 n.5 (2000) (discretionary exceptions

²The interested third parties you notified are: URS Corporation; The Thompson Agency; and Espey Consultants, Inc.

³ 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). Here, we do not address any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

generally). Accordingly, the attorney fee bills at issue may not be withheld under section 552.103 or 552.105.

The Texas Supreme Court has held, however, that the Texas Rules of Evidence are “other law” within the meaning of section 552.022 of the Government Code. *See In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will address the confidentiality of portions of the submitted information in Exhibit 2 under Rule 503 of the Texas Rules of Evidence. Rule 503(b)(1) of the Texas Rules of Evidence provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client’s lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer’s representative;

(C) by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

Tex. R. Evid. 503(b)(1); *see id.* 503(a)(2), (a)(4) (defining “representative of the client,” “representative of the lawyer.”) A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5).

A governmental body seeking to withhold information from public disclosure pursuant to the attorney-client privilege must: (1) demonstrate that the document at issue is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) demonstrate that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Open Records Decision No. 676 (2002).

You have highlighted the portions of the submitted attorney fee bills that you seek to withhold pursuant to the attorney-client privilege. Upon review of your arguments and the information at issue, we find you have established that the information you have highlighted in Exhibit 2 is protected by the attorney-client privilege. Thus, we determine that the authority may withhold this information pursuant to Rule 503 of the Texas Rules of Evidence. The remaining fee bill information in Exhibit 2 must be released.

We next address your claim under section 552.103 of the Government Code for the remaining 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 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 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, 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). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the authority 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).

You explain that the LGWSP is a joint project of the Guadalupe-Blanco River Authority ("GBRA"), the San Antonio Water System ("SAWS"), and the authority to provide a significant source of water for Bexar County and surrounding regions. You further explain that there is a threat of anticipated litigation by the O'Connors, landowners whose property would be affected by the LGWSP pipeline. You state that Mr. Blackburn, the attorney representing the O'Connors, stated that "the O'Connor's were opposed to the LGWSP, they felt GBRA, SAWS and [the authority] were not dealing with them in good faith and that they would use litigation to stop the LGWSP." Additionally, you have submitted to this office an affidavit of Gregory E. Rothe, General Manager for the authority, in which he states that

Mr. Blackburn stated . . . that he would lead the fight against GBRA, SAWS, and [the authority] and the LGWSP in any available venue, including the permit process and State and Federal courts. I took these comments to be a clear indication that the O'Connor's would litigate against the project and its sponsors.

Based on the information you provided, we agree that litigation involving the authority was reasonably anticipated at the time it received the instant request for information. In addition, we find that the remaining submitted information is related to the anticipated litigation for purposes of section 552.103(a). Thus, you may withhold the remaining submitted information pursuant to section 552.103 of the Government Code.

Generally, however, 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. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to all other parties in the anticipated litigation is not excepted from disclosure under section 552.103(a), and must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982). As we are able to make this determination, we need not address your remaining arguments.

In summary, the computer user names and passwords we have marked in Exhibit 14 are not public information and therefore not subject to the Act. The authority may withhold the information you have highlighted in Exhibit 2 pursuant to Rule 503 of the Texas Rules of Evidence as information protected by the attorney-client privilege. The remaining fee bill

information in Exhibit 2 must be released. The remaining submitted information may be withheld pursuant to section 552.103 of the Government Code.

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,



Debbie K. Lee
Assistant Attorney General
Open Records Division

DKL/seg

Ref: ID# 202601

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