



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

July 23, 2004

Ms. Christy Drake-Adams
Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel, L.L.P.
816 Congress Avenue
Suite 1700
Austin, Texas 78701

OR2004-6153

Dear Ms. Drake-Adams:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 205719.

The City of Marble Falls (the "city"), which you represent, received a request for information pertaining to specified "severance compensation offers" and "counter compensation offers[s]." You claim that the requested information is excepted from disclosure pursuant to sections 552.101 and 552.103 of the Government Code. You indicate that the city notified the individual who is the subject of this request and whose proprietary interests may be implicated by the request of the city's receipt of the request and of this individual's right to submit arguments to us as to why any portion of the requested information should not be released to the requestor. *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). We have considered the exceptions you claim and have reviewed the submitted information.

Initially, we note that an interested third party is allowed ten business days after the date of its receipt of a governmental body's notice under section 552.305(d) of the Government Code to submit its reasons, if any, as to why requested information relating to that party

should be withheld from disclosure. See Gov't Code § 552.305(d)(2)(B). As of the date of this letter, the individual who is the subject of this request has not submitted comments to us explaining why any portion of the submitted information should not be released. Thus, we have no basis to conclude that the release of any portion of the submitted information would implicate this individual's proprietary interests. See, e.g., Open Records Decision Nos. 552 at 5 (1990) (party must establish prima facie case that information is trade secret), 661 at 5-6 (1999) (stating that business enterprise that claims exception for commercial or financial information under section 552.110(b) must show by specific factual evidence that release of requested information would cause that party substantial competitive harm). Accordingly, we conclude that the city may not withhold any portion of the submitted information on the basis of any proprietary interest that this individual may have in the information.

You claim that the submitted information is excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with judicial decision.¹ In this regard, you argue that the submitted information is confidential pursuant to judicial decision, citing *McGuire v. Commercial Union Insurance Company of New York*, 431 S.W.2d 347 (Texas 1968), *General Motors Corporation v. Simmons*, 558 S.W.2d 855 (Texas 1977), *City of Houston v. Sam P. Wallace and Co.*, 585 S.W. 2d 669 (Texas 1979), and *Rural Development, Inc. v. L.T. Stone*, 700 S.W. 2d 661 (Tex. Civ. App.—Corpus Christi 1985, writ refs'd n.r.e.). We note, however, that none of these decisions determined the confidentiality of any information. See *McGuire*, 431 S.W.2d at 352 (court determined settlement agreement not admissible in evidence on issues of liability or as admission against interest); *General Motors*, 558 S.W.2d at 857 (court determined that Texas rule is that evidence of settlement agreements between plaintiff and co-defendant should be excluded from jury); *Sam P. Wallace and Co.*, 585 S.W. 2d at 673 (court determined that Texas rule, with limited exception, is that evidence of settlement agreements should be excluded from jury because agreement may be taken as admission of liability); *Rural Development*, 700 S.W. 2d at 667-68 (court determined that evidence to be considered by jury must come from source other than conduct and statements at meeting to attempt settlement). Upon review, we determine that the cases you cite do not support your claim that the submitted information is confidential by law. Accordingly, we conclude that the city may not withhold any portion of the submitted information under section 552.101 of the Government Code as information made confidential by judicial decision.

You also claim that the submitted information is excepted from disclosure pursuant to section 552.103 of the Government Code. Section 552.103 provides in part:

¹ Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. See Gov't Code § 552.101.

(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 city maintains the burden of providing relevant facts and documents sufficient to establish the applicability of section 552.103 to the information that it seeks to withhold from disclosure. To meet this burden, the city must demonstrate: (1) that litigation was pending or reasonably anticipated on the date of its receipt of the request and (2) that the information at issue is related to that litigation. *See 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.); *see also* Open Records Decision No. 551 at 4 (1990). Both elements of the test must be met in order for information to be excepted from disclosure under section 552.103. *See id.*

You state, and provide documentation showing, that the submitted information relates to litigation involving the city as a party that was pending on the date that the city received this request for information. Based on your arguments and our review of the submitted information, we, thus, agree that section 552.103 of the Government Code applies to this information. However, we note that once information has been obtained by all parties to the pending 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 opposing party in the pending litigation is not excepted from disclosure under section 552.103(a) and may not be withheld from disclosure on that basis.² In this regard, we note that all of the submitted information has been seen by the opposing party in the pending litigation. Accordingly, we conclude that the city may not withhold any portion of the submitted information under section 552.103 of the Government Code.

² Further, 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).

We note that portions of the submitted information may be excepted from disclosure pursuant to section 552.117(a)(1) of the Government Code. Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that this information be kept confidential pursuant to section 552.024 of the Government Code. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time that the request for it is received by a governmental body. *See* Open Records Decision No. 530 at 5 (1989). Thus, the city may only withhold information under section 552.117(a)(1) on behalf of a current or former official or employee who made a request for confidentiality under section 552.024 prior to the date on which the request for this information was received by the city. The city may not withhold such information under section 552.117(a)(1) for an employee who did not make a timely election to keep the information confidential. Based on our review of the submitted information, we have marked the portions of this information that are excepted from disclosure pursuant to section 552.117(a)(1) of the Government Code, provided that the former employee with whom this information is associated elected confidentiality for this information prior to the date that the city received this request for information.

In summary, the city must withhold the portions of the submitted information, which we have marked, pursuant to section 552.117(a)(1) of the Government Code, provided that the former employee with whom this information is associated elected confidentiality for this information prior to the date that the city received this request. The city 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/jh

Ref: ID# 205719
Enc. Marked documents

c: Mr. Gary D. Parson
The Highlander
304 Gateway Loop
Marble Falls, Texas 78654
(w/o enclosures)

c: Mr. Bryan Hicks
326 Meadowlakes Drive
Marble Falls, Texas 78654
(w/o enclosures)