



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

May 26, 2005

Mr. Paul C. Sarahan
Texas Commission on Environmental Quality
P.O. Box 13087
Austin, Texas 78711-3087

OR2005-04617

Dear Mr. Sarahan:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 224907.

The Texas Commission on Environmental Quality (the "commission") received a request for "any and all documents pertaining to the Brine Service Company Superfund Site." You state that some information has been made available to the requestor, but claim that some of the requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, 552.136, and 552.137 of the Government Code. You also claim that some of the submitted information may be excepted from disclosure under section 552.110 of the Government Code, but make no arguments regarding this exception. Pursuant to section 552.305(d) of the Government Code, the commission notified the interested third party Boomerang Corporation of the commission's receipt of the request for information and of its right to submit arguments to this office as to why the information at issue should not be released to the requestor. *See* Gov't Code § 552.305(d); *see also* 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 to disclosure in certain circumstances). We have considered the exceptions you claim and reviewed the submitted information, some of which you indicate is a representative sample or samples.¹

¹ 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.

Section 552.101 excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information protected by other statutes. The information in Tab 5 consists of federal tax returns and related information. Section 6103(a) of title 26 of the United States Code makes federal tax return information confidential. *See* 26 U.S.C. § 6103(a); *See also* Attorney General Opinion H-1274 (1978) (tax returns); Open Records Decision Nos. 600 (1992) (W-4 forms), 226 (1979) (W-2 forms). Federal courts have construed the term “return information” expansively to include any information gathered by the Internal Revenue Service regarding a taxpayer’s liability under title 26 of the United States Code. *See Mallas v. Kolak*, 721 F. Supp 748, 754 (M.D.N.C. 1989), *dismissed in part, aff’d in part, vacated in part, and remanded*, 993 F.2d 1111 (4th Cir. 1993). Section 6103(b) defines the term “return information” as “a taxpayer’s identity, the nature, source, or amount of income, payments, tax withheld, deficiencies, overassessments or tax payments . . . or any other data, *received by, recorded by, prepared by, furnished to, or collected by the Secretary* [of the Internal Revenue Service] with respect to *a return* . . . or the determination of the existence, or possible existence, of *liability* . . . for any tax, . . . penalty, . . . , or offense[.]” *See* 26 U.S.C. § 6103(b)(2)(A) (emphasis added). The commission must withhold the information we have marked in tab 5 under section 552.101 in conjunction with section 6103 of title 26 of the United States Code.

We note that the submitted information contains social security numbers that may be confidential under federal law. The 1990 amendments to the federal Social Security Act make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See* 42 U.S.C. § 405(c)(2)(C)(viii)(I). We have no basis for concluding that any of the social security numbers in the file are confidential under section 405(c)(2)(C)(viii)(I), and therefore excepted from public disclosure under section 552.101 on the basis of that federal provision. We caution, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing any social security number information, the commission should ensure that no such information was obtained or is maintained by the commission pursuant to any provision of law enacted on or after October 1, 1990.

You claim that section 552.103 of the Government Code is applicable to the submitted information you have included in Tabs 1, 2, 3, and 7. This section 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). The commission 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 when the request for information was received, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. 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). The commission must meet both prongs of this test for information to be excepted under section 552.103(a).

In order to establish that litigation is reasonably anticipated, a governmental body must provide this office “concrete evidence showing that the claim that litigation may ensue is more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986). When the governmental body is the prospective plaintiff in the anticipated litigation, the concrete evidence must at least reflect that litigation involving a specific matter is “realistically contemplated.” See Open Records Decision No. 518 at 5 (1989); see also Attorney General Opinion MW-575 (1982) (investigatory file may be withheld if governmental body’s attorney determines that it should be withheld pursuant to predecessor to section 552.103 and that litigation is “reasonably likely to result”).

You inform us that the information at issue relates to a site contaminated with hazardous substances and that, “[i]f the responsible parties cannot be compelled to undertake the response actions, the [commission] and the [Environmental Protection Agency] will expend funds to perform the necessary response activities at the Site.” Further, you state that “[t]hereafter, the [commission] will be statutorily required to pursue a cost recovery action against parties responsible for such contamination” under section 361.197 of the Health and Safety Code. See Health & Safety Code § 361.197(a)-(d). Based on your representations, we agree that you have shown litigation was reasonably anticipated when the commission received the request for information. In addition, we find that the information in Tabs 1, 2, 3, and 7 is related to the anticipated litigation for purposes of section 552.103(a). Therefore, the commission may withhold the information in Tabs 1, 2, 3, and 7 pursuant to section 552.103.

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 opposing parties in the anticipated litigation is not excepted

from disclosure under section 552.103(a), and it 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).²

You raise section 552.136 of the Government Code as applicable to account numbers reflected in Tab 4. We note that the information in Tab 8 also includes account numbers. Section 552.136 of the Government Code states that “[n]otwithstanding 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. The commission must, therefore, withhold the marked account numbers under section 552.136.

You raise section 552.137 of the Government Code as applicable to an e-mail address reflected in Tab 6. Section 552.137 excepts from disclosure “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 consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). The e-mail address at issue is not one of the types specifically excluded by section 552.137(c). Therefore, unless the individual at issue consented to the release of his e-mail address, the commission must withhold it in accordance with section 552.137 of the Government Code.

Finally, for the remaining submitted information in Tabs 4 and 8, we note that 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 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, Boomerang has not submitted to this office any reasons explaining why the remaining requested information relating to it should not be released. We thus have no basis for concluding that any portion of the submitted information in Tab 4 or Tab 8 constitutes proprietary information, and none of it may be withheld on that basis. *See, e.g.,* Gov’t Code § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

In summary, the commission must withhold the information we have marked in Tab 5 under section 552.101 of the Government Code in conjunction with section 6103 of title 26 of the United States Code. The social security numbers may be confidential under federal law. The commission may withhold the information in Tabs 1, 2, 3, and 7 pursuant to section 552.103 of the Government Code. The commission must withhold the marked account numbers

² As our ruling for this information is dispositive, we need not consider your other claimed exceptions.

under section 552.136 and the marked e-mail address under section 552.137 of the Government Code. 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, upon receiving this ruling, the governmental body will either release the public records promptly pursuant to section 552.221(a) of the Government Code or file a lawsuit challenging this ruling pursuant to section 552.324 of the Government Code. If the governmental body fails to do one of these things, 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); *Tex. 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,

A handwritten signature in black ink that reads "Cary Grace". The signature is fluid and cursive, with a long horizontal line extending to the right.

Cary Grace
Assistant Attorney General
Open Records Division

ECG/jev

Ref: ID# 224907

Enc. Submitted documents

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