ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

April 27, 2006

Ms. Allison Holland
Olson & Olson, L.L.P.
Wortham Tower, Suite 600
2727 Allen Parkway
Houston, Texas 77019

OR2006-04254

Dear Ms. Holland:

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# 246345.

The Harris County Appraisal District (the "district"), which you represent, received a request for copies of all files and information pertaining to the judicial appeals of specified accounts. You state that the district will release the submitted settlement agreements to the requestor,[1] but claim that the remaining requested information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, 552.117, and 552.147 of the Government Code.[2] You also claim that portions of the requested information may contain proprietary information that is subject to the Act. Pursuant to section 552.305 of the Government Code, you state that you have notified third parties Apartment Data Services, CoStar Group ("CoStar"), and REVAC of the request and of each company's right to submit comments to this office as to why the information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to

[1]The district withdrew its assertion that the documents in Exhibits C and D constitute confidential settlement negotiation materials under section 552.101 of the Government Code in conjunction with sections 154.053 and 154.073 of the Civil Practice and Remedies Code, as well as section 2009.054 of the Government Code.

[2]We note that the district failed to timely assert sections 552.117 and 552.147 of the Government Code. *See* Gov't Code § 552.301(b). However, because these are mandatory exceptions, we will consider your arguments under these exceptions. *See id.* § 552.302.

section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure under the Act in certain circumstances). We have received comments from CoStar. We have considered all of the submitted arguments and the submitted representative sample of information.[3]

Initially, we note that some of the information the district seeks to withhold was created after the district's receipt of the instant request for information. Because this information was created after the district's receipt of the request, it is not encompassed by the request. *See Econ. Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.–San Antonio 1978, writ dism'd); Open Records Decision No. 452 at 3 (1986) (governmental body not required to disclose information that did not exist at the time request was received). Accordingly, we do not address the availability of this non-responsive information, and the district need not release it in response to this request.

Next, we address CoStar's claim that a portion of Exhibit F is commercially available and is therefore not subject to the Act. Section 552.027 of the Government Code provides in part:

> (a) A governmental body is not required under this chapter to allow the inspection of or to provide a copy of information in a commercial book or publication purchased or acquired by the governmental body for research purposes if the book or publication is commercially available to the public.

Gov't Code § 552.027(a). Section 552.027 is designed to alleviate the burden of providing copies of commercially available books, publications, and resource materials maintained by governmental bodies, such as telephone directories, dictionaries, encyclopedias, statutes, and periodicals. The legislative history of this provision notes that section 552.027 should exclude from the definition of public information

> books and other materials that are also available as research tools elsewhere *to any member of the public*. Thus, although public library books are available for public use, the library staff will not be required to do research or make copies of books for members of the public.

INTERIM REPORT TO THE 74TH LEGISLATURE OF THE HOUSE STATE AFFAIRS COMM., 74th Leg., R.S., SUBCOMMITTEE ON OPEN RECORDS REVISIONS 9 (1994) (emphasis added).

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[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). 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.

Therefore, section 552.027 excludes commercially available research material from the definition of "public information."

CoStar claims that its comparable sales reports are commercially available. We note, however, that Costar does not allow its competitors to have access to the information at issue. Indeed, CoStar acknowledges that its services are "limited to those that work for CoStar and those that are authorized by CoStar via license agreement to access such information services." Where access to information is limited to certain individuals, it cannot be said that such information is available "to any member of the public." Therefore, we find that CoStar has failed to demonstrate that the submitted information came from the type of commercial book or publication contemplated by section 552.027. *See* Gov't Code § 552.027. Accordingly, we conclude that CoStar's comparable sales reports submitted in Exhibit F are "public information" and, therefore, subject to the Act. *See id.* § 552.002.

We also note that portions of the submitted information are made expressly public under 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:
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> (17) information that is also contained in a public court record.

Gov't Code § 552.022(a)(17). The submitted information contains court-filed documents. Therefore, you may only withhold this information if it is confidential under other law. You argue that the submitted records are excepted under section 552.103 Government Code. We note, however, that section 552.103 is a discretionary exception to public disclosure that protects the governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469, 475-76 (Tex. App.--Dallas 1999, no pet.) (governmental body may waive section 552.103); Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). As such, section 552.103 does not qualify as other law that makes information confidential for the purposes of section 552.022. The district therefore may not withhold the section 552.022 records pursuant to section 552.103.

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. Section 6103(a) of title 26 of the United States Code provides that tax return information is confidential. *See* 26 U.S.C. § 6103(a)(2), (b)(2)(A), (p)(8); *see also* Open Records Decision No. 600 (1992); Attorney General Op. MW-372 (1981). Tax return information is defined as data furnished to or collected by the Internal Revenue Service with respect to the determination of possible existence of liability of any person under title 26 of the United States Code for any tax.

See 26 U.S.C. § 6103(b). Upon review, we conclude that Exhibit E consists of tax return information that must be withheld by the district under section 552.101 of the Government Code in conjunction with federal law.[4]

We next address the district's claim under common law privacy for the information submitted as Exhibit G, which is also encompassed by section 552.101. In *Industrial Foundation v. Texas Industrial Accident Board*, the Texas Supreme Court held that information is protected by common law privacy if it (1) contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person and (2) is not of a legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683. The common law right to privacy also encompasses personal financial information not relating to a financial transaction between an individual and a governmental body. *See* Open Records Decision Nos. 600 (1992), 545 (1990). We note, however, that common law privacy protects the interests of individuals, not those of corporations or other types of business organizations. *See* Open Records Decision Nos. 620 (1993) (corporation has no right to privacy), 192 (1978) (right to privacy is designed primarily to protect human feelings and sensibilities, rather than property, business, or other pecuniary interests); *see also U. S. v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *Rosen v. Matthews Constr. Co.*, 777 S.W.2d 434 (Tex. App.—Houston [14th Dist.] 1989), *rev'd on other grounds*, 796 S.W.2d 692 (Tex. 1990) (corporation has no right to privacy). Upon review, we find that the submitted information in Exhibit G pertains to a corporation. Accordingly, we conclude that no portion of this information is excepted from disclosure pursuant to section 552.101 of the Government Code on the basis of common law privacy.

The district raises section 552.103 of the Government Code for Exhibit B. 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.
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[4]As we reach this conclusion, we need not address your claims under sections 552.117 and 552.147 of the Government Code for this information.

> (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 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. *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 governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

You state that the district has been sued over its appraisal of the account at issue in Exhibit B, and provide documentation showing that the district received notice of suit prior to the date of the instant request. Based on these representations and our review, we find that litigation was pending against the district at the time the request was received. We also find that the information at issue in Exhibit B is related to the pending litigation. Thus, section 552.103 is applicable to Exhibit B.

We note however, that 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 the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. As it appears that some of the information the district claims is excepted from release under section 552.103 has been provided to the opposing party in the anticipated litigation, we find that this information may not be withheld under section 552.103. The district may withhold the remaining portions of Exhibit B that have not been provided to the opposing party in the pending litigation pursuant to section 552.103. Finally, we note that 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).

The district raises section 552.107 of the Government Code for the information in Exhibit B not subject to section 552.103, and for portions of Exhibits C and D. Section 552.107 protects information that is encompassed by the attorney-client privilege. *See* Gov't Code § 552.107(1). When asserting the attorney-client privilege, a governmental body maintains the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or

documents a communication. *See id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element.

Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *see id.* 503(b)(1), meaning it was "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." *See id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state that the documents you have marked in Exhibits B, C, and D constitute communications between legal counsel for the district, legal representatives, and the district. You also explain that certain documents were provided to legal counsel for the district by the district in order to obtain legal advice concerning various legal matters. You assert that confidentiality of these documents has been maintained. Based on your representations and our review, we conclude the district may withhold the documents we have marked in Exhibits C and D under section 552.107. However, we find you have failed to demonstrate how the remaining submitted information constitutes privileged attorney-client communications. Furthermore, we note that certain documents indicate on their face they have been disclosed to non-privileged parties, and thus are not protected by the attorney-client privilege. Therefore, the district may withhold only the documents we have marked under section 552.107 of the Government Code.

The district asserts that the information in Exhibits B not excepted under section 552.103, and the remaining submitted information in Exhibits C and D constitute attorney work

product. Section 552.111 encompasses the attorney work product privilege found in Rule 192.5 of the Texas Rules of Civil Procedure. *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as

> (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
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> (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. TEX. R. CIV. P. 192.5; ORD 677 at 6-8. In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and [created or obtained the information] for the purpose of preparing for such litigation. *Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204. Upon review of the district's arguments and the information at issue, we find that the district has demonstrated that portions of the information in Exhibit D were prepared for trial or in anticipation of litigation. Therefore, the district may withhold the information we have marked in Exhibit D under section 552.111 as attorney work product. As previously noted, some of the documents for which the district claims attorney work product indicate on their face they have been shared with the opposing party, and therefore are not privileged under section 552.111. The district has failed to demonstrate that the remaining information was prepared for trial or in anticipation of litigation, and therefore, none of the remaining information may be withheld on this basis.

Section 552.111 also 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." 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. You state that portions of Exhibits C and D consist of interagency communications of district appraisers regarding the valuation of real property, and assert that such communications pertain to appraisal methodology. However, we find you have failed to demonstrate how any portion of the information at issue consists of advice, recommendations, or opinions reflecting the district's policymaking. Therefore, none of the submitted information may be withheld under section 552.111 on this basis.

We now turn to the arguments submitted for the information at issue in Exhibit F. Section 552.305 of the Government Code allows an interested third party ten business days from the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. *See* Gov't Code § 552.305(d)(2)(B). However, as of the date of this letter, we have not received arguments from Apartment Data Services or REVAC for withholding the information at issue. Therefore, we have no basis to conclude that the release of any portion of Exhibit F would harm the proprietary interests of Apartment Data Services or REVAC *See id.* § 552.110(b); Open Records Decision Nos. 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), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret). Accordingly, we conclude that the district may not withhold any portion of Exhibit F on the basis of any proprietary interest that Apartment Data Services or REVAC may have in the information.

CoStar asserts that its information in Exhibit F is excepted under section 552.110 of the Government Code. Section 552.110(b) excepts from disclosure "[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." Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the requested information. *See* Open Records Decision No. 661 at 5-6 (1999) (business enterprise must show by specific factual evidence that release of information would cause it substantial competitive harm). Having considered CoStar's arguments and the information at issue, we find that CoStar has made a specific factual or evidentiary showing that release of the information at issue in Exhibit F, which we have marked, would cause the

company substantial competitive harm. Thus, this marked information must be withheld pursuant to section 552.110(b).[5]

Finally, the district asserts that the remaining information at issue in Exhibit F may be excepted from disclosure under section 552.101 in conjunction with federal copyright law. We note that federal copyright law does not make information confidential for purposes of section 552.101. *See* Open Records Decision No. 660 at 5 (1999). However, a custodian of public records must comply with the copyright law and is not required to furnish copies of records that are copyrighted. Attorney General Opinion JM-672 (1987). A governmental body must allow inspection of copyrighted materials unless an exception applies to the information. *Id.* If a member of the public wishes to make copies of copyrighted materials, the person must do so unassisted by the governmental body. In making copies, the member of the public assumes the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

In summary, the district must withhold: 1) Exhibit E under section 552.101 in conjunction with federal law; and 2) the information we have marked in Exhibit F under section 552.110(b) of the Government Code. The district may withhold: 1) the portions of Exhibit B that have not been provided to the opposing party in the pending litigation under section 552.103 of the Government Code; 2) the information we have marked in Exhibits C and D under section 552.107 of the Government Code; and 3) the information we have marked in Exhibit D under section 552.111 of the Government Code. The remaining submitted information must be released; however, in releasing information that is protected by copyright, the district must comply with applicable copyright law.

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

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[5]As our ruling on this issue is dispositive, we need not address CoStar's remaining argument for this information.

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); *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 Office of the Attorney General 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. 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,

Lisa V. Cubriel
Assistant Attorney General
Open Records Division

LVC/krl

Ref: ID# 246345

Enc: Submitted documents

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