



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

November 24, 2009

Mr. Les Trobman  
General Counsel  
Texas Commission on Environmental Quality  
P.O. Box 13087  
Austin, Texas 78711-3087

Mr. Robert Martinez  
Director, Environmental Law Division  
Texas Commission on Environmental Quality  
P.O. Box 13087  
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OR2009-16690

Dear Messrs. Trobman and Martinez:

You both ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Texas Government Code. Your requests were assigned ID# 362301.

The Texas Commission on Environmental Quality (the "TCEQ") received a request from Senator Eliot Shapleigh<sup>1</sup> for certain information related to the American Smelting and Refining Company (aka "ASARCO") and any information "indicating destruction of documents that might otherwise be responsive to" his request for information. The TCEQ's Office of General Counsel and its Environmental Law Division have submitted separate briefs to this office, along with separate sets of information that are responsive to Senator Shapleigh's request. The Office of General Counsel and the Environmental Law Division both state that some of the information that is responsive to this request has been made

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<sup>1</sup>Senator Shapleigh explicitly states that he is not making this request pursuant to section 552.008 of the Texas Government Code. *See* TEX. GOV'T. CODE ANN. § 552.008 (Vernon 2005) (granting an individual member of the legislature access to information, including confidential information, if requested for legislative purposes).

available to the requestor.<sup>2</sup> The Office of General Counsel and the Environmental Law Division both claim that the responsive information each submitted is excepted from disclosure under sections 552.101, 552.103, 552.107 and 552.111 of the Texas Government Code, Texas Rule of Evidence 503, and Texas Rule of Civil Procedure 192.5. The Office of General Counsel also contends that some of the responsive information it submitted is subject to two previous open records letter rulings. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note that the Office of General Counsel has marked portions of the information it submitted as not responsive to the request. This open records letter ruling does not address the public availability of any non-responsive information, and the TCEQ is not required to release non-responsive information in response to this request.

Next, the Office of General Counsel informs us that the responsive information it submitted in Exhibits C-2, C-3, C-5, D and E was also the subject of previous requests for information. The Office of General Counsel states that it withheld this information from the previous requestors pursuant to Open Records Letter Nos. 2008-06741 (2008) and 2008-10112 (2008), which were issued by our Open Records Division. The Office of General Counsel indicates that there has been no change in the relevant law, facts, and circumstances on which the previous rulings are based. Thus, we determine that the Office of General Counsel may continue to rely on Open Records Letter Nos. 2008-06741 and 2008-10112 for the information subject to those rulings. TEX. GOV'T. CODE ANN. § 552.301(a) (Vernon 2005); Tex. Att'y Gen. ORD-673 (2001) at 6-7 (specifying when a governmental body may rely on a previous determination).

Next, we note that the Environmental Law Division has submitted cost estimate information related to certain TCEQ activity. This information falls within the scope of section 552.022(a)(5) of the Texas Government Code, which provides for the required public disclosure of "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" unless the information is expressly confidential under other law. TEX. GOV'T. CODE ANN. § 552.022(a)(5). Therefore, the submitted cost estimate information must be released unless it is confidential under "other law." Sections 552.103, 552.107(1), and 552.111 of the Texas Government Code do not constitute "other law" for purposes of section 552.022, and the cost estimate information may not be withheld under those provisions. *See id.* § 552.007; *Dallas Area Rapid Transit v. Dallas Morning News*, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (section 552.103); Tex. Att'y Gen. ORD-677 (2002) (section 552.111); Tex. Att'y Gen. ORD-676 (2002) (section 552.107(1)). However, sections 552.101 and 552.107(2) of the Texas Government Code, Texas Rule of Evidence 503, and Texas Rule of Civil Procedure 192.5 do constitute "other law" for purposes of section 552.022. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001) (Texas Rules

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<sup>2</sup>In its letter to this office, dated October 14, 2009, the Environmental Law Division states that it has already released to the requestor a document it originally sought to withhold. Accordingly, the Environmental Law Division is no longer seeking a ruling from this office on that particular document.

of Evidence and Civil Procedure constitute "other law"). We will therefore consider whether the cost estimate information may be withheld under any of those provisions.

Texas Rule of Evidence 503 enacts the attorney-client privilege and provides in part:

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). 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). Thus, in order to withhold attorney-client privileged information under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show 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. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privileged enumerated in rule 503(d). *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

The Environmental Law Division states that the submitted cost estimate information consists of a communication between TCEQ attorneys and staff. It also states that the communication was made for the purpose of facilitating the rendition of professional legal services and was not intended to be, nor has it been, disclosed to third parties. Based on these representations and our review, we agree that the submitted cost estimate information, which we have

marked, is protected under the attorney-client privilege and may be withheld pursuant to Texas Rule of Evidence 503.<sup>3</sup>

Next, the Office of General Counsel asserts that the remainder of the information it submitted in Exhibit C is excepted from disclosure under section 552.103 of the Texas Government Code. The Environmental Law Division also claims that the remainder of the information it submitted is excepted from disclosure under that provision. Section 552.103 provides in part:

(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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(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.

TEX. GOV'T. CODE ANN. § 552.103(a), (c). The governmental body has the burden of providing relevant facts and documents to show that section 552.103(a) is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, 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.); Tex. Att'y Gen. ORD-551 (1990) at 4. The governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

The Office of General Counsel and the Environmental Law Division both state that the TCEQ is a party to several lawsuits that were filed prior to its receipt of the current request for information. The Office of General Counsel and the Environmental Law Division also both state that those lawsuits are currently pending. Based on the submitted arguments and our review, we conclude that the Office of General Counsel's remaining responsive information in Exhibit C and the remainder of the information submitted by the Environmental Law Division are related to one or more of these pending lawsuits for purposes of section 552.103. Therefore, the Office of General Counsel's remaining

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<sup>3</sup>As our ruling is dispositive as to this information, we need not consider whether this information may be withheld under sections 552.101 and 552.107(2) of the Texas Government Code and Texas Rule of Civil Procedure 192.5.

responsive information in Exhibit C and the remainder of the information submitted by the Environmental Law Division may be withheld pursuant to section 552.103 of the Texas Government Code.<sup>4</sup>

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. Tex. Att'y Gen. ORD-349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing parties in the pending 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 litigation has been concluded. Op. Tex. Att'y Gen. MW-575 (1982); Tex. Att'y Gen. ORD-350 (1982).

In summary, the information marked by the Office of General Counsel as not responsive to this request need not be released. The Office of General Counsel may continue to rely on Open Records Letter Nos. 2008-06741 and 2008-10112 for the responsive information it submitted in Exhibits C-2, C-3, C-5, D, and E. The cost estimate information submitted by the Environmental Law Division, which we have marked, may be withheld under Texas Rule of Evidence 503. The Office of General Counsel's remaining responsive information in Exhibit C and the remainder of the information submitted by the Environmental Law Division may be withheld pursuant to section 552.103 of the Texas Government Code.

This letter ruling is limited to the particular information 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 information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



James A. Person III  
Assistant Attorney General  
General Counsel Division

JAP/sdk

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<sup>4</sup>Because our ruling is dispositive, we need not address the remaining arguments submitted by the Office of General Counsel and the Environmental Law Division.

Ref: ID# 362301

Enc. Submitted documents

c: Requestor  
(w/o enclosures)